82-1632

NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MARY E. BARGER
Plaintiff-Petitioner

v.

PETROLEUM HELICOPTERS, INC.
Defendant-Respondent

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether any structure that is designed to float upon the water and is capable of flotation upon the water can be a vessel for purposes of the Jones Act.

II. Whether the Air Commerce Act, 49 U.S.C. § 1509 should be used to define "vessel" as that term is used in the Jones Act 46 U.S.C. § 688 and § 801; the Longshoremen & Harbor Workers Act 33 U.S.C. § 903 and § 905(b) and the Outer Continental Shelf Lands Act 43 U.S.C. § 1333(b).

LIST OF PARTIES

The undersigned, counsel of record for Plaintiff-Petitioner Mary E. Barger, certifies that the following parties have an interest in the outcome of this case:

(1) Mary E. Barger, and counsel, Benckenstein, McNicholas, Oxford, Radford & Johnson of Beaumont, Texas.

(2) Petroleum Helicopters, Inc. and counsel, Lugenbuhl, Larzelere & Ellefson of New Orleans, Louisiana.

(3) Bell Helicopters, Inc. and counsel, Fulbright & Jaworski of Houston, Texas.

(4) American Home Assurance Company, Intervenor and counsel, Mehaffy, Weber, Keith & Gonsoulin of Beaumont, Texas.

HUBERT OXFORD, III

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To The Honorable Justices Of The Supreme Court Of The United States Of America:

Petitioner, MARY E. BARGER, would respectfully show:

OFFICIAL AND UNOFFICIAL REPORTS

The only reports of this case of which Petitioner is aware are found in Volume 514, Federal Supplement at

page 1199 and Volume 692 Federal Reporter, Second Series at page 337.

STATEMENT OF GROUNDS FOR JURISDICTION

This Petition arises from an appeal from a Judgment entered on the 20th day of May, 1981, in the United States District Court of the Eastern District of Texas, Beaumont Division, the Honorable Joe J. Fisher presiding.

On appeal to the United States Court of Appeals for the Fifth Circuit, the Judgment of the District Court was reversed and remanded on the 19th day of November, 1982. Plaintiff-Petitioner's Petition for Panel Rehearing and Suggestion for Rehearing En Banc were denied on January 6, 1983 and modified on January 13, 1983. Plaintiff-Petitioner's Motion for Reconsideration of Petition for Rehearing and Suggestion En Banc was denied on March 9, 1983.

This Honorable Court has jurisdiction to consider this Petition pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED

1 U.S.C. § 3
33 U.S.C. § 903
33 U.S.C. § 1601
43 U.S.C. § 1333
46 U.S.C. § 688
46 U.S.C. § 801
46 U.S.C. § 888
49 U.S.C. § 1509

STATEMENT OF THE CASE

(1) Statement of Facts.

On April 23, 1976, the Decedent, WALTER BARGER, pilot and navigator of a Bell 250A-1 amphibious helicopter manufactured by BELL HELICOPTER, INC., Division of Textron, Inc. and owned by his employer, PETROLEUM HELICOPTERS, INC., left Cameron, Louisiana to fly forty (40) miles into the Gulf of Mexico to carry offshore drilling workers to a platform. The crash which killed WALTER BARGER and all of his passengers was caused when the tailboom separated from the remainder of the helicopter due to metal fatigue. This particular amphibious helicopter was equipped with float-type pylons below the fuselage. These flotation devices were permanently affixed and not just emergency pontoons. Each and every time this craft took off or landed, it took off or landed on these floats. PETROLEUM HELICOPTERS, INC. and this flotable machine were regularly engaged in the business of transporting passengers and equipment to offshore rigs. This particular helicopter was designed to float on water, loaded or empty, and was capable of being taxied on water with people or cargo in it. These amphibious helicopters were purchased by PETROLEUM HELICOPTERS, INC. for the particular purpose of carrying people or equipment on or over the water to offshore rigs and between offshore rigs. Because of this helicopter's flotation equipment and capabilities, its flying capabilities were restricted from those of normal aircraft to flight below certain altitudes and certain temperature differentials, as well as lower speeds. The flight manual which accompanies this helicopter places no limitations on how far the helicopter

may be taxied upon the water, nor does PETROLEUM HELICOPTERS, INC. have such limitations. PETROLEUM HELICOPTERS, INC.'s pilots are trained to take off and land on water, as well as to taxi on water. This amphibious helicopter did the greatest percentage of its flying over water, as the Cameron, Louisiana base of PETROLEUM HELICOPTERS, INC. is adjacent to the water and the helicopter's destinations are all in the Gulf of Mexico. Ferrying crews over water to a rig or a platform was the normal use of this helicopter; this helicopter was doing the work normally done by crew boats. PETROLEUM HELICOPTERS, INC. admitted that this helicopter was fitted with pontoon-type landing gear for the purpose of landing on navigable waters and was used to carry crewmembers on or over the ocean to drilling rigs.

(2) Statement of Proceedings and Disposition in the Courts Below.

This suit was filed in the United States District Court for the Eastern District of Texas, Beaumont Division on April 21, 1977, for damages arising out of the death of WALTER BARGER on April 23, 1976. Plaintiff asserted a claim against PETROLEUM HELICOPTERS, INC., employer of the Decedent, WALTER BARGER, under the General Maritime Law and Jones Act (46 U.S.C. § 688) and the Death on the High Seas Act (46 U.S.C. § 761). Plaintiff also asserted a claim against BELL HELICOPTERS INTERNATIONAL, INC./ TEXTRON (BELL) based on Texas Product Liability Law applicable in Admiralty to the Death on the High Seas Act. The case was tried to the District Court and on May 31, 1981, the Honorable Joe J. Fisher, District

Judge, entered Final Judgment and a Memorandum Opinion under which PETROLEUM HELICOPTERS, INC. was found eighty (80%) percent liable and BELL was found twenty (20%) percent liable. The District Court found that this particular helicopter, because of its peculiar configuration, was a vessel and that the Decedent was a member of the crew of that vessel. Judgment was entered for Plaintiff and the Decedent, WALTER BARGER, was found to be a Jones Act seaman.

On November 10, 1982, a three judge panel for the United States Court of Appeals for the Fifth Circuit consisting of Judges Brown, Rubin and Reavley issued an Opinion written by Judge Rubin which reversed the District Court, holding that the helicopter was not a vessel under the Jones Act and that WALTER BARGER was not a seaman. Judge Brown dissented from the majority opinion and requested a polling of the entire panel for an "en banc" rehearing. Plaintiff/Petitioner filed a Petition for Panel Rehearing and Suggestion for Rehearing En Banc which were denied by the United States Court of Appeals for the Fifth Circuit on January 6, 1983 and later modified on January 13, 1983. Plaintiff/Petitioner's Motion for Leave to File a Motion for Reconsideration of Petition for Rehearing and Suggestion for Rehearing En Banc was denied on March 9, 1983.

BASIS FOR ORIGINAL JURISDICTION IN THE DISTRICT COURT

The jurisdiction of the District Court was invoked under Rule 9(h) of Federal Rules of Civil Procedure, Admiralty Jurisdiction.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CREATES CONFUSION AND INCONSISTENCIES IN THE FEDERAL MARITIME LAW BY ITS STATUTORY CONSTRUCTION OF THE JONES ACT, 46 U.S.C. §688 AND §801, THE LONGSHOREMEN AND HARBOR WORKERS ACT 33 U.S.C. §903 AND §905(b), THE OUTER CONTINENTAL SHELF LANDS ACT 43 U.S.C. §1333(b) AND THE AIR COMMERCE ACT 49 U.S.C. §1509.

The Fifth Circuit in its Opinion below excluded the amphibious helicopter piloted by the Decedent from the meaning of the term "vessel" under the Jones Act, 46 U.S.C. § 688 and so held WALTER BARGER was not a seaman/member of the crew of a vessel for Jones Act purposes. The Jones Act is found in the Merchant Marine Act of 1920 which also contains this provision at 46 U.S.C. § 888:

> When used in this Act, unless the context otherwise requires, the terms 'person', 'vessel', 'documented under the laws of the United States,' and 'citizen of the United States' shall have the meaning assigned to them by § 801, § 802 and § 803 of this Section.

§ 801 referred to above contains this definition of the term "vessel" to be used for all purposes in the Merchant Marine Act of 1920:

> The term 'vessel' includes all watercraft and other artificial contrivances of whatever description and at whatever stage of construction, whether on the stocks or launched, which are used *or are capable of being used* or are intended to be used as a means of transportation on water. [Emphasis added].

Plaintiff/Petitioner contends that this is the proper statutory definition to be applied in determining whether a craft is a vessel for purposes of the Jones Act and that this definition clearly encompasses the amphibious helicopter piloted by the Decedent here. Petitioner also contends that numerous other Federal Statutes define vessel in essentially the same manner.

Both the Longshoremen and Harbor Workers Compensation Act (LSHWA), 33 U.S.C. § 903 and the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1333 (b), exclude "a master or member of the crew of any vessel" from longshore coverage and so leave seamen to be covered by the Jones Act, yet neither the LSHWA nor OCSLA expressly define the term "vessel". However, the LSHWA is contained within Title 33, *Navigation and Navigable Waters,* which does contain a definition. 33 U.S.C. § 1601(1) states:

> 'Vessel' means every description of watercraft, including non-displacement craft and seaplanes, used or capable of being used as a means of transportation on water.

Despite these foregoing statutory definitions of the term "vessel", the Fifth Circuit relied upon the Air Commerce Act, 49 U.S.C. § 1509, to construe the meaning of the term "vessel" for purposes of the Jones Act in both *Barger v. Petroleum Helicopters, Inc.,* 692 F.2d 337 (5th Cir. 1982) and *Smith v. Pan Air Corp.,* 684 F.2d 1102 (5th Cir. 1982), which was adopted by reference in the *Barger* Opinion. Although the Fifth Circuit relied upon the Air Commerce Act for its assertion that the Navigation and Shipping Laws of the United States are not to be construed to apply to seaplanes or other aircraft, this Section makes an exception to its own pro-

visions where § 143 to § 147(d) of Title 33 provide otherwise. § 143 to § 147(d) have been repealed, revised, recodified and now appear in 33 U.S.C. § 1601 et seq. which is quoted above and which specifically includes "non-displacement craft and seaplanes *used* or *capable of being used* as a means of transportation on water." (Emphasis added).

The Fifth Circuit erred in its statutory construction of the Jones Act by going outside the Navigation and Shipping Laws to the Air Commerce Act, and even then ignoring the exception included in the Air Commerce Act which adopts the definition relied upon by Petitioner.

The major error made by the Fifth Circuit in its statutory construction was in failing to give controlling weight to the definition of vessel contained in 1 U.S.C. § 3:

> . . . 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

This statutory definition was applied to the LSHWA and Jones Act by the United States Supreme Court in *Norton v. Warner Company,* 321 U.S. 565, 571 n.4, 64 S.Ct. 747, 751, 88 L.Ed. 931, 937. The United States Supreme Court once again recognized the encompassing scope of this definition in its recent decision in *Foremost Insurance Company v. Richardson,* ____U.S.____, ____ S.Ct.____, 73 L.Ed.2d 300, 306 (S.Ct. 1982).

Many specialized Federal Statutes use the same wording as 1 U.S.C. § 3, leaving no doubt that aircraft are intended by Congress to be incorporated in the Maritime Law when appropriate. See, Northern Pacific Halibut Act, 1937, 16 U.S.C. § 772(a)(h); Sockeye Salmon Fishing Act of 1947, 16 U.S.C. § 776(f); The Whaling Conven-

tion Act of 1949, 16 U.S.C. § 916(e); The Tariff Act of 1930, 19 U.S.C. § 1401(a).

Many other Federal Statutes are even more broad than the language of 1 U.S.C. § 3 in defining the term "vessel". See the Armed Forces Act, 10 U.S.C. § 7651(b); the Criminal Code, 18 U.S.C. § 3615; and the Internal Revenue Code, 26 U.S.C. § 4241(d)(3) and 26 U.S.C. § 5688(c). The Criminal Code, 18 U.S.C. § 1081 defines a vessel as:

> . . . any ship, boat, barge or other watercraft or *any structure capable of floating on the water.* (Emphasis added).

The Neutrality Act of 1939, 22 U.S.C. § 456(c) includes in its definition of vessel:

> . . . every description of watercraft and aircraft capable of being used as a means of transportation on, under or *over the water.* (Emphasis added).

The thrust of the Fifth Circuit's error in excluding all aircraft, as a matter of law and not of fact, from the definition of vessel under the Jones Act, is to limit the weight given the trier of fact in Jones Act cases which Congress did not intend. Instead, Federal legislation has recognized the flexibility that must be contained in a definition of vessel to suit different factual circumstances. In Part 3 of the Interstate Commerce Act, 49 U.S.C. § 10102(26) § 901, the term "vessel" is broadly defined as:

> . . . a watercraft or other artificial contrivance that is used, or is capable of being used, or is intended to be used, as a means of transportation by water.

If the Fifth Circuit's logic in limiting regulation of all aircraft to the Air Commerce Act were to be strictly

applied, would a cargo laden plane taxiing on the water or a hovercraft going over the water between two states escape the provisions of the Interstate Commerce Act? Clearly, the only workable construction of the term "vessel" in this situation would incorporate an aircraft into the definition of vessel and Congress has clearly allowed this flexibility by its use of terms such as "capable," or "intended". The Fifth Circuit's rejection of WALTER BARGER's helicopter as a vessel simply because it was an aircraft places unworkable restraints upon the development of the Federal Maritime Law in dealing with new technology and ignores the broad language repeatedly used by Congress in defining this term.

Although the Fifth Circuit relies upon the Air Commerce Act for its interpretation of the term "vessel", the exclusion, if made, of this craft in the definition of one act does not necessarily dictate its exclusion under the Jones Act. This very issue was discussed in *Sohyde Drilling & Marine v. Coastal States Gas Prod.*, 644 F.2d 1132 (5th Cir. 1981). There, the Court noted that the definition of vessel under the Jones Act is far more expansive and liberal than it may be under other acts of Congress.

> When attempting to determine whether a structure is or is not a 'vessel' within the scope of a particular statutory enactment, the underlying intent of the legislature should be ascertained, if at all feasible. Notwithstanding that two statutes contain substantially similar definitions of the term 'vessel' what may reasonably qualify as 'vessel' for the purpose of one statute might well thwart the purpose of the other statute.

Sohyde, at 1137, n.5.

The propriety of the statutory test employed by the Fifth Circuit in defining the term "vessel" under the Jones Act justifies the Grant of Certiorari to review the Judgment below.

II.

THE DECISION BELOW RAISES SIGNIFICANT AND RECURRENT PROBLEMS CONCERNING EFFORTS TO MAINTAIN A UNIFORM FEDERAL MARITIME LAW AS EVIDENCED BY CONFLICTS IN PRINCIPLE WITH THE DECISIONS OF BOTH THE UNITED STATES SUPREME COURT, NINTH CIRCUIT AND OTHER FIFTH CIRCUIT DECISIONS.

Reaching a workable definition of the term "vessel" for Jones Act purposes has become a recurrent problem in the Federal courts, and has become especially troublesome in recent years due to the advanced technology in special purpose structures not seen heretofore in maritime commerce. The Fifth Circuit has been called upon to address this issue on a frequent basis, most often due to the special problems presented by the offshore oil drilling industry in the Gulf of Mexico. The landmark case of *Offshore Drilling Company v. Robison,* 266 F.2d 769 (5th Cir. 1959) recognized the need for a flexible definition in construing the term "vessel" for purposes of the Jones Act:

> Attempts to fix unvarying meanings have a firm legal significance to such terms as 'seaman,' 'vessel,' 'member of the crew' must come to grief on the facts. These terms have such wide range of meanings under the Jones Act as interpreted in the courts, that, except in rare cases, only a juror or a trier of facts can determine their application in the circumstances

> of a particular case. Even where the facts are largely undisputed, the question at issue is not solely a question of law when, because of the conflicting inferences that may lead to a different conclusion among reasonable men, a trial judge cannot state an unvarying rule in law that fits the facts. . . . within broad limits of what is reasonable Congress has seen fit to allow juries to decide who are seamen under the Jones Act. There is nothing in the act that indicates that Congress intended the law to apply only to the conventional members of a ship's company. The absence of any legislative restriction has enabled the law to develop naturally along the development of unconventional vessels, such as the strange-looking, specialized water craft designed for oil operations offshore and in the shallow coastal waters of the Gulf of Mexico.

Offshore Drilling Company v. Robison, supra.

The Fifth Circuit in *Robison* went on to define vessel as:

> including special purpose structures not usually employed as a means of transport by water, but designed to float on water.

Offshore Drilling Company v. Robison, supra. Thus the Fifth Circuit incorporated the same flexibility in its definition of vessel as can be found in the statutory definitions cited in the preceding section of this Petition.

The United States Supreme Court has also recognized non-traditional craft as vessels under the Jones Act. See *Grimes v. Raymond Concrete Pile Company,* 356 U.S. 252, 778 S.Ct. 687, 2 L.Ed.2d 737 (1958), in which a Texas tower radar station was found to be a vessel. Likewise, the Ninth and Fifth Circuits have recently held

even stranger craft to be vessels: an aquatic barrier in *Nelson v. United States*, 639 F.2d 469 (9th Cir. 1980); a drag line in *Guidry v. Continental Oil Company*, 640 F.2d 523; and an oil storage facility in *Hicks v. Ocean Drilling & Exploration Company*, 512 F.2d 817, 823 (5th Cir. 1975). The only logic which connects these cases is not to look at the ordinary use of the craft in question, but whether it was designed or intended to float on water.

Even so, the Fifth Circuit in the case at bar ignored the design and capabilities of this helicopter and instead focused on what it called the "primary function" or "primary design" of the craft as that of an aircraft. However, the primary function of a drilling rig is to drill oil wells. *Offshore Drilling Company v. Robison, supra.* The primary function of a Texas tower radar station is to find or detect aircraft. *Grimes v. Raymond Concrete Pile Company, supra.* The primary function of an aquatic barrier is as a wave suppressor. *Nelson v. United States, supra.* The primary function of a dragline is excavation work. *Guidry v. Continental Oil Company, supra.* The primary funciton of an oil storage facility is to store oil. *Hicks v. Ocean Drilling & Exploration Company, supra.*

The Fifth Circuit has recently issued another Opinion determining vessel status in *Fox v. Taylor Diving & Salvage Company*, 694 F.2d 1349 (5th Cir. 1983). In *Fox* the Fifth Circuit held a non-navigable chamber used to create an airtight compartment in which pipeline repairs can be performed not to be a vessel, because its function is that of a tool, not a vessel. *Barger v. Petroleum Helicopters, Inc.*, 514 F.Supp. 1199, 692 F.2d 337, was cited as authority for this holding. However, to state the function of a craft as a matter of law unreasonably derogates the role of the fact finder. As noted above,

there may be more than one function of a craft. Plaintiff/Petitioner contends that if *one* of the functions of a craft is to float on water, that need not be its sole or primary function to be a vessel.

The Trial Court in the *Barger* case found that the BARGER helicopter was the functional equivalent of a crew boat and that "BARGER's helicopter was constructed for the purpose of transporting men and materials across the navigable waters of the Gulf of Mexico.", *Barger, supra.* At the time of the accident, the BARGER helicopter was on its way "across water to the drilling site." *Barger, supra.* However, this finding of function was ignored by the Fifth Circuit.

The Fifth Circuit also attempted to exclude the BARGER helicopter from the definition of vessel by stating that it was airborne and not floating at the time of the accident. Whether or not the helicopter was airborne is an unknown fact (since WALTER BARGER's body was never recovered), but, even so, neither was the drilling platform in *Offshore Drilling Company v. Robison, supra* afloat. In that case the drilling platform was hard aground and the injured seaman ninety (90) feet above the sea.

No logical basis for distinction of the BARGER helicopter exists under the law of either the United States Supreme Court, the Fifth Circuit or the Ninth Circuit. The exclusion of the BARGER helicopter from the meaning of the term "vessel", merely because it was an "aircraft" is arbitrary.

The result of the Fifth Circuit's decision in *Barger* is to exclude the navigator and pilot of this helicopter from the coverage of the Jones Act, despite the same exposure to the hazards of sea faced by WALTER BAR-

GER as all other seamen, and to place him under the administration of the LSHWA. The Supreme Court of the United States has recognized the important role of helicopter transportation to the maritime industry in *Higginbotham v. Mobil Oil Corporation,* 357 F.Supp. 1164 (W.D. La. 1973), 545 F.2d 422 (5th Cir. 1977), rev'd on other grounds, 436 U.S. 618, 56 L.Ed.2d 581, 98 S.Ct. 2010. That this question will continue to trouble not only the courts of the Fifth Circuit but other circuits as well is obvious as the Outer Continental Shelf Lands are further developed. That this irreconcilable reasoning should arise within the Fifth Circuit, as well as conflicting in principle with the United States Supreme Court in *Grimes v. Raymond Concrete Pile Company, supra,* and the Ninth Circuit in *Nelson v. United States, supra,* is indicative of a need for guidance from this Court. The number of "special purpose structure" cases filed under the Jones Act grows each year; indeed, another helicopter-pilot seaman case is currently pending against PETROLEUM HELICOPTERS, INC. in the Eastern District Court of Louisiana, Division M, Civil Action No. 83-171-CA, styled *Raymond Trott v. Petroleum Helicopters, Inc., et al.*

The Fifth Circuit itself was divided on the Rehearing En Banc of this case, with 4 members voting in favor of the rehearing with Justice Brown, one of the more distinguished admiralty scholars of the Fifth Circuit Court of Appeals, dissenting from the Opinion.

The special importance of achieving a Uniform Maritime Law in these conflicts in principle justify the Grant of Certiorari to review the Judgment below.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the Judgment and Opinion of the Fifth Circuit.

Respectfully submitted,

By: _____
HUBERT OXFORD, III

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81-2262

MARY E. BARGER,
Plaintiff-Appellee, Cross-Appellant,

v

PETROLEUM HELICOPTERS, INC.,
Defendant-Appellant, Cross-Appellee.

Appeals from the United States District Court
for the Eastern District of Texas

(November 10, 1982)

Before BROWN, RUBIN, and REAVLEY, Circuit Judges

RUBIN, Circuit Judge:

This case raises many of the issues we decided in *Smith v. Pan Air Corp.*, 684 F.2d 1102 (5th Cir. 1982). We, therefore, address in detail only one issue that distinguishes this case: as to claims against a helicopter pilot's employer for the death of the pilot while transporting passengers to work on the outer Continental Shelf, is the Longshoremen's and Harbor Workers' Compensation Act the exclusive remedy? We conclude that such a pilot is not covered by the Jones Act because an aircraft is not a vessel, that the Outer Continental Shelf Lands Act applies to the pilot, and that the LHWCA is the exclusive remedy for those who have claims resulting from his death.

Walter Barger, like Walter Kolb, one of the decedents in *Smith*, was a helicopter pilot regularly engaged in transporting oil field workers and equipment from Louisiana to platforms located in the Gulf of Mexico on the outer Continental Shelf. While he was flying a helicopter carrying eleven passengers, the helicopter crashed into the Gulf forty miles offshore, killing all aboard. Barger's widow and children seek damages in admiralty for his death from his employer, Petroleum Helicopters,[1] contending that Barger was a Jones Act seaman and also asserting maritime tort claims for the alleged unseaworthiness of the helicopter. After trial on the merits, the district court sustained both claims and awarded damages.

We held in *Smith* that the wrongful death claim of Kolb's beneficiaries against a third party, not the decedent's employer, arising from the crash of an aircraft into the high seas, is properly within admiralty jurisdiction by virtue of decisions so interpreting the Death on the High Seas Act, 46 U.S.C.A. §§ 761-768 (West 1975 & Supp. 1982) (DOHSA). *Smith*, 684 F.2d at 1108-12. The accident involved in *Smith* occurred on the outer Continental Shelf, but we decided that § 1333(a) of the OCSLA, 43 U.S.C. § 1333(a) (Supp. IV 1980), making state law applicable as surrogate federal law to accidents occurring on fixed platforms, does not supersede the DOHSA so as to oust admiralty jurisdiction over the plaintiff's claim.[2]

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1. Suit was also filed against Bell Helicopter Textron, a division of Textron, Inc., the manufacturer of the helicopter. Bell and the plaintiff agreed that, if Bell were cast in judgment, Bell would pay the plaintiff $225,000 and waive any right to appeal. The district judge found Bell also liable and apportioned liability 20% to Bell and 80% to Petroleum Helicopters. Thus, no issues relating to the plaintiffs' claims against Bell are before us.

2. *See Smith*, 684 F.2d at 1109-11. For similar reasons, we held

The wrongful death claim in this case, unlike the Kolb claim in *Smith*, is asserted against the decedent's employer Petroleum Helicopters. Section 1333(b) of the OCSLA provides, "[w]ith respect to . . . death of an employee resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting . . . the natural resources . . . of the subsoil and seabed of the outer Continental Shelf, compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act [33 U.S.C.A. §§ 901-950 (West 1978 & Supp. 1982) (LHWCA)]."[3] Section 933(i) of the LHWCA provides that this compensation is the exclusive remedy of an injured employee against his employer. 33 U.S.C.A. § 933(i). Therefore, if Barger was covered by 43 U.S.C. § 1333(b), there can be no recovery against his employer under general maritime law. Even if admiralty jurisdiction existed because Barger's death resulted from an aircraft crash on the high seas, *see Smith*, 684 F.2d at 1109, recovery would be barred by § 933(i) and the claim would fail on the merits.

The *Barger* plaintiffs argue that Barger was a Jones Act seaman, and therefore excluded from coverage under

---

that Petroleum Helicopters's claim for property damage arising from the same accident was likewise not ousted from admiralty jurisdiction by the OCSLA. *See id.* at 1112.

3. The section continues:

> For the purposes of the extension of the provisions of the Longshoremen's and Harbor Workers' Compensation Act under this section—
>
> (1) the term "employee" does not include a master or member of a crew of any vessel . . .;
>
> (2) the term "employer" means an employer any of whose employees are employed in [exploring for, developing, removing, or transporting by pipeline the natural resources . . . of the subsoil and seabed of the outer Continental Shelf].

43 U.S.C.A. § 1333(b) (West Supp. 1982).

43 U.S.C. § 1333(b). That section provides that the term "employee" does not include "a master or member of a crew of any vessel." 43 U.S.C. § 1333(b)(1). For the same reasons discussed in *Smith*, 684 F.2d at 1112-14, we conclude that a helicopter cannot be considered a "vessel," and, therefore, that this exclusion from LHWCA coverage does not extend to Barger.

Smith involved several claims. Jordan, whose claim was asserted by his beneficiary (Smith), was flying a plane. Kolb and Barger were both piloting helicopters. Jordan's aircraft, like Barger's had attachments enabling it to land on and take off from water. Kolb's helicopter apparently had no such attachment. But each of these aircraft, whether or not fitted with pontoons, was designed primarily to fly through the air not to travel on water. The dissent of our respected colleague apparently assumes that a helicopter sans pontoons used for the self-same purpose, to transport personnel to and from offshore platforms, is not a vessel. Neither a plane nor a helicopter undergoes a maraculous transformation from aircraft into vessel when pontoons are attached to it, and their pilots do not by this act become members of a "vessel's" crew. The helicopter's amphibian adaptations were designed solely to permit it to take off from and land on water and to taxi on water in order to position itself for loading and unloading with a view to travel through the air. It was an aircraft that might use the surface of the water for a time to facilitate airborne commerce. An airplane does not become an automobile because it has wheels attached and can taxi on runways. The wheels no more change aircraft into land vehicles than pontoons change aircraft into vessels. Just as a vessel does not lose its nautical quality merely because it is anchored for a time to

serve as a drilling platform, an aircraft does not become a vessel because it is adapted to float and taxi on the water for brief periods in order to perform incidental functions that aid in its primary mission. The Jones Act was designed to aid those who face the hazards of the sea, not the perils of the air. Barger did not meet death from a collision at sea or the action of the waves but as a result of an aircraft disaster. *See* Symposium, *Aircraft as Vessels Under the Jones Act and General Maritime Law*, 22 S. Tex. L.J. 595, 600-03 (1982).

It remains only to be determined, then, whether the claim against Barger's employer is covered by the OCSLA. This depends on (1) whether Barger's death was the "result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting . . . the natural resources . . . of the outer Continental Shelf," and (2) whether Barger's employer, Petroleum Helicopters, was an "employer" within the intendment of 43 U.S.C. § 1333(b)(2).

The first of these conditions is clearly met. In Stansbury v. Sikorski Aircraft, 681 F.2d 948 (5th Cir. 1982), a Chevron Oil Company employee was killed when the Chevron-owned helicopter in which he was a passenger crashed on the high seas over the Shelf. We held that the compensation act provided Stansbury's sole remedy against his employer, Chevron, because Stansbury had been inspecting work done under his supervision on a fixed rig located on the Shelf. "His work furthered the rig's operations and was in the regular course of the extractive operations on the [Shelf]. *But for those operations*, he would not have been in the helicopter. His

death, therefore, occurred 'as a result of operations' as required by the OCSLA." *Id.* at 951 (emphasis added). Barger likewise would not have been killed in a helicopter crash in the Gulf of Mexico "but for" the fact that he was employed to transport eleven workers to a fixed platform on the Shelf. His work furthered mineral exploration and development activities and was in the regular course of such activities.

With respect to the second condition for OCSLA coverage, the term "employer" means "an employer any of whose employees are employed in [operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting . . . the natural resources . . . of the outer Continental Shelf]." 43 U.S.C. § 1333(b)(2). Unlike the employer in *Stansbury*, Petroleum Helicopters, Barger's employer, was not itself engaged in mineral operations. However, helicopter transportation of men and equipment from the mainland to the offshore rigs and back plays an important role in "developing" the Shelf. This transportation is an "operation conducted . . . for the purpose of" natural resource development. Helicopter pilots involved in these operations perform the same function with respect to resource development whether employed directly by a producer or by a separate contractor, and should not be treated differently on the basis of who their immediate employer is. We decline to inject another element of inconsistency into an area already beset by more than its fair share of incongruous results.[4]

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4. *See generally* Robertson, *Injuries to Marine Petroleum Workers: A Plea for Radical Simplification*, 55 Tex. L. Rev. 973, 973 (1977) ("Since the oil industry went offshore, the legal system has struggled to produce a body of injury law that is rational, fair, in-

Aside from the fact that this case involves an employer and employee, the only kind of claim to which the compensation remedy applies, there is another important distinction between Barger's claim and the claim in *Smith*. The OCSLA compensation coverage provision already quoted is expansive. It extends to *every* injury or death "occurring as a result of operations . . . for the purpose of exploring for, developing, removing, or transporting . . . natural resources." 43 U.S.C.A. § 1333(b). The state law extension clause, however, is considerably narrower, providing *only* for the application of state law to "the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon." 43 U.S.C. § 1333(a). Thus state law is made applicable only to workers in certain areas and not to all employees engaged in mineral development, while the compensation statute reaches any employee killed or injured while exploiting the Shelf's resources.

We, therefore, hold that Barger's exclusive remedy against his employer was LHWCA compensation.[5] The district court's judgment is REVERSED and the case is REMANDED for further proceedings not inconsistent with this opinion.

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ternally consistent, and acceptably productive of safety incentives. The result has been chaos.") (footnote omitted).

5. The district court held in the alternative that, even if Barger were covered by the LHWCA, section 905(b) of that act gives a covered employee the right to bring an action against the "vessel owner" for negligence. Citing Smith v. M/V Captain Fred, 546 F.2d 119 (5th Cir. 1977), the court noted that the "circumstances that the vessel owner and the employer are the same entity does not preclude such an action." However, section 905(b) is simply irrelevant here unless a helicopter is a "vessel." We have concluded that it is not. *See* text *supra* and *Smith*, 684 F.2d at 1112-13. Therefore, workers' compensation remains Barger's sole remedy against his employer.

81-2262—MARY E. BARGER v. PETROLEUM HELICOPTERS, INC.

JOHN R. BROWN, Circuit Judge, dissenting:

To the dual holding[1] that the helicopter was not a "vessel" and Barger, its pilot was not a "seaman", I must respectfully dissent.

To narrow the point of difference, I wish to make clear the extensive areas in which I am in full agreement with Judge Rubin's scholarly analysis. Without a doubt, 43 U.S.C. § 1333(b) of the Outer Continental Shelf Lands Act (OCSLA) brings into play § 933(i) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) which prescribes the exclusive remedy for injury and death cases by the Act. I quite agree that Barger's death was the "result of operations conducted on the Outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting . . . the natural resources . . . of the Outer Continental Shelf . . .", 43 U.S.C. § 1333(b), and that his employer, Petroleum Helicopters, Inc., was engaged in such operations in performing the essential service of transporting men and equipment from the mainland to the offshore rigs.

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1. The dual determination was based, in effect, on the almost contemporaneous holding of the Court as to the Smith claim in Smith v. Pan Air Corporation, 684 F.2d 1102, 1112, n.39 (5th Cir. 1982). Of necessity, this dissent attacks that determination. Instead of concurring specially because of a decision binding on me until altered by the Court en banc, I am dissenting, since with the filing of this dissent I will seek formally rehearing en banc, F.R.A.P. Rule 35, of the instant case which will inevitably bring into question the correctness of the *Smith* decision.

At the same time, I agree the case is not controlled by the local law of the adjacent state (Louisiana) as "surrogate" federal law under the OCSLA, 43 U.S.C. § 1333 (a)(2)(A). See text accompanying n.25, 684 F.2d at 1109. Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969).[2] I also agree that the Kolb claim against the third party in *Smith* for the death of a helicopter pilot in waters off the Outer Continental Shelf was a maritime claim within the jurisdiction of the admiralty. 684 F.2d 1111-12.

And I embrace wholeheartedly the Court's conclusion that the suit by the helicopter owner in the Kolb claim of *Smith* for loss of a helicopter was within the admiralty jurisdiction. *Id.* at 1112. All of this means that for the death of Barger the Longshoremen's Act is the exclusive remedy against the employer, Petroleum Helicopters, Inc., *unless* he was ". . . a master or member of the crew of [a] vessel. . . ." 43 U.S.C. § 1333(b)(1).

This dramatizes the narrow, but significant, difference in our views. The Court having held (i) in the Kolb third party death action that the claim under DOHSA was within the admiralty and it was so maritime as to be beyond the reach of adjacent surrogate law, 43 U.S.C. § 1333(a)(2)(A); and having held (ii) in the claim for the owner's loss of the helicopter that the helicopter was engaged "in maritime-type function, transporting persons

2. The Court states:

> Unlike both Monk and the workers considered in *Rodrigue*, the helicopter pilot was engaged in a maritime-type function, transporting persons over the seas.
>
> We hold, therefore, that admiralty jurisdiction over Kolb's claim against nonemployer third parties is not ousted by section 1333(a) of the OCSLA.

684 F.2d at 1111-12 (note omitted).

over the sea", 684 F.2d at 1111, because the aircraft was "being used in place of a vessel to ferry personnel and supplies to and from offshore drilling structures, . . ." and this bore ". . . the type of significant relationship to traditional maritime activity . . . necessary to invoke admiralty jurisdiction . . .", *Id.* at 1112, the case suddenly loses its admiralty character by the interposition of the Longshoremen's Act.

It is no answer that this is what Congress has prescribed since the LHWCA provides itself that seamen are excluded. The helicopter is doing what a vessel would ordinarily do—transport persons and property to and from the mainland and the offshore structure. The pilot is doing what the master and crew of a vessel would do, namely, operate the craft. Each activity is maritime and maritime related. Each meets the exclusions and principles set forth in Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972). Injury or loss to each in the OCSLA waters is within the admiralty. The factor which makes each within the admiralty is the function and purpose of the use of the craft. All that is lacking is a "vessel" in the usual traditional sense of a thing which can float on or in water to carry persons or things from one place to another.

But the normal physical characteristics to constitute an object a "vessel" have never deterred the Supreme Court or this Court from finding unusual, nontraditional, odd, non-maritime structures to be "vessels", and the person serving to fulfill the mission of such structures to be seamen under the Jones Act.

The classic case is Judge Wisdom's celebrated decision in Offshore Co. v. Robison, 266 F.2d 769 (5th Cir.

1959). There, following significant Supreme Court decisions, we held an oil field "roustabout" who did not know how to, or what was meant by, the ability to "hand, reef and steer," to be a Jones Act seaman for injuries received while a floating submersible rig was made fast to the bottom of the bay by jack-up legs raising the deck of the drilling barge way above the level of the water. At the time of the injury the drilling platform was not afloat. It was hard aground. The drilling barge could not move. The only relation it had to the sea was its past—when it was towed to a new location—or, its future—when it would again be towed to another location.

Equally spectacular was the decision in Gianfala v. Texas Co., 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 775 (1955). Gianfala and his crew members slept ashore in an oilfield camp and worked aboard a drilling barge which was resting on the bottom of the bay at the time of the injury. The Court held Gianfala to be a seaman within the scope of the Jones Act. Even more spectacular was Grimes v. Raymond Concrete Pile Co., 356 U.S. 252, 78 S.Ct. 687, 2 L.Ed.2d 737 (1958) in which the contractor was building a "Texas tower" radar station for location in the North Atlantic to be permanently affixed to the floor of the ocean. After the tower was towed to its offshore site, Grimes did only piledriving work. He drowned when he fell out of a life ring used to carry him from a tug to the tower. The Supreme Court reversed the First Circuit and held that the "petitioner's evidence presented an evidentiary basis for a jury's finding whether or not the petitioner was a member of the crew of any vessel" to thus circumvent the equivalent of LHWCA coverage under the Defense Bases Act. *Id.* at 253.

Courts of Appeals and District Courts have extended *Robison* to strange sorts of things to find them to be a "vessel" and the injured person a seaman,[3] and the so called floating submersible drilling barges are invariably hard aground, incapable of any movement—martime or otherwise.[4] As a matter of physical, operative fact they are just as land-bound, non-maritime as the fixed raised drilling platform over which it is uncontradicted that none is a vessel.

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3. Nelson v. United States, 639 F.2d 469 (9th Cir. 1980) (a wave suppressor, an aquatic barrier erected in the water to protect boats at the Coast Guard station from heavy waves which is permanently affixed to the sea floor held to be a vessel and the decedent, a piledriver, was a seaman within the Jones Act); Guidry v. South Louisiana Contractors, 614 F.2d 447 (5th Cir. 1980) (elevated boom of a large dragline was a vessel; case remanded for jury determination whether injured party was Jones Act seaman); Hicks v. Ocean Drilling & Exploration Co., 512 F.2d 817 (5th Cir. 1975) (submersible oil storage facility resting on the bottom of the Gulf held to be a vessel and plaintiff a seaman); Brinegar v. San Ore Construction Co., Inc., 302 F.Supp. 630 (E.D. Ark. 1969) (fuel tank pontoon vessel capsized at time of accident held to be a vessel and plaintiff a Jones Act seaman).

4. Submersible drilling barge cases are legion and invariably involve injuries occurring while the drilling barge is fixed on the ocean floor and not floating or in movement. *See* Daughdrill v. Diamond M Drilling Co., 447 F.2d 781 (5th Cir. 1971); Neill v. Diamond M. Drilling Co., 426 F.2d 487 (5th Cir. 1970); Producers Drilling Co. v. Gray, 361 F.2d 432 (5th Cir. 1966); Harney v. William M. Moore Building Corp., 359 F.2d 649 (2d Cir. 1966); Clary v. Ocean Drilling and Exploration Co., 429 F.Supp. 905 (W.D. La. 1977); McNeese v. An Son Corp., 334 F.Supp. 290 (S.D. Miss. 1971); McCarty v. Services Contracting Inc., 317 F.Supp. 629 (E.D. La.); Robichaux v. Kerr McGee Oil Industries, Inc., 317 F.Supp. 587 (W.D. La. 1970); Rogers v. Gracey-Helluns Corp., 331 F.Supp. 1287 (E.D. La. 1970); Hebert v. California Oil Co., 280 F.Supp. 754 (W.D. La. 1967); Ledet v. U.S. Oil of Louisiana, Inc., 237 F.Supp. 183 (E.D. La. 1964); Oliver v. Ocean Drilling & Exploration Co., 222 F.Supp. 843 (W.D. La. 1963); Guilbeau v. Falcon Seaboard Co., 215 F.Supp. 909 (E.D. La. 1963).

The upshot of these decisions for our case is that because the helicopter was regularly operated in the transportation of persons and property to and from the mainland and the offshore structures, it was engaged in maritime activities so that the loss of the helicopter and the death of the pilot were a maritime tort within the jurisdiction of the admiralty. It is maritime because of the nature of the work it regularly performed—the transportation of persons and property. This is made positive by the Court's treatment of the pilot's (Kolb's) claim. The Court emphasized that "his duties constantly carried him back and forth above the high seas over the outer Continental Shelf." 684 F.2d at 1111. Disregarding the relationship of the death claim to the OCSLA and the acknowledged separate jurisdiction under DOHSA, the Court went on:

> Even apart from this 'special treatment' accorded airplane crash victims, there would still be admiralty jurisdiction over Kolb's accident, as we show below in regard to Petroleum Helicopters' property claim arising from the same accident. *See Part IIC* infra.

Id. And after stating in Part IIC that the "logic of *Executive Jet* appears to require extension of admiralty jurisdiction to nondeath claims arising on the high seas if the aircraft flight has the essential maritime nexus," *Id.* at 1112, the Court eliminating the "if", concluded:

> Therefore, both the locality and maritime nexus requirements being met, we hold that the *Petroleum Helicopters* claim, like the *Kolb* death claim, may be brought in admiralty. *Id.*

To the Court's *quaere*, *Id.* at 1113, n.41, the record in this case and the trial court's factual findings clearly re-

flect that the amphibious helicopter here come within the broad, virtually indefinable *Robison* definition of a special purpose craft.[5] The judge found that this amphibious helicopter was specially designed and built not only to take off and land on water but also to taxi on the water. It could move under its self-propulsion on the water to position itself for the loading or unloading of cargo or passengers. He characterized the craft as one designed to function as a crew boat without which the gigantic offshore oil industry's maritime operations, *see* Boudreaux v. American Workover, Inc., 680 F.2d 1034 (5th Cir. 1982), (en banc), could not function. Indeed this seems to have been the sole function of this helicopter.[6]

More than that the helicopter literally met the Congressional definition that "any artificial contrivance . . . capable of being used, as a means of transportation on water" constitutes a vessel.[7] 684 F.2d at 1113, n.40.

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5. It must be emphasized that a *Robison* vessel determination does not necessarily or automatically mean Jones Act status, so the question is broader than: "Is the injured worker a Jones Act seaman?" *See* Dugas v. Pelican Construction Co., 481 F.2d 773 (5th Cir. 1973) (not a Jones Act seaman but entitled to seaman's warranty of seaworthiness).

6. The Supreme Court in Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 619, n.2, 56 L.Ed.2d 581, 583, n.2, 98 S.Ct. 2010, _____, n.2, said "[t]he District Court bottomed admiralty jurisdiction on a finding that the helicopter was the functional equivalent of a crewboat. The ruling has not been challenged in this Court." (citation omitted).

7. Since we are dealing directly with the usage of not only the LHWCA but also more recently the 1953 OCSLA, 43 U.S.C. § 1333 (c)(1) as amended September 18, 1978, 43 U.S.C § 1333(b)(1), the Court's explanation, 684 F.2d at 1113, n.40, not only ignores these historical facts (plus the substantial 1972 amendments to the LHWCA) but also this Court's express conclusion that we must determine what Congress meant about a matter on which it could not have thought because of technological non-existence. For example,

Whatever the meaning of the full text of 49 U.S.C. § 1509(a) rather than the Court's paraphrase of it, 684 F.2d at 1113, the fact is that in very recent actions Congress has definitely included seaplanes (including helicopters) within the meaning of the term "vessel". In the major overhaul of the International Regulations for Preventing Collisions at Sea, 33 U.S.C. § 1601 *et seq.* (1977), the Congress in 1977 did several significant things. It repealed the long standing "Rules of the Road." It provided for a proclamation by the President and the promulgation of the International Regulations for Preventing Collisions at Sea (International Rules).[8]

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discussing the technological advances made since Congress enacted COGSA, this Court has stated:

> Our principal task in this case is to determine what Congress would have thought about a subject about which it never thought or could have thought and one about which we have never thought nor any other Court has thought. Technology has created a maritime transportation system unlike any which was in existence in 1936 when Congress enacted COGSA. (note omitted).

Wirth Ltd. v. S/S ACADIA FOREST and LASH Barge, 537 F.2d 1272, 1276 (5th Cir. 1976).

The question remains then, what did Congress mean in 1953 when it enacted § 1333(b)(1) of the OCSLA, the statute which cuts off the maritime claim for the death of the pilot. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 26 L.Ed.2d 339, 90 S.Ct. 1772 (1970).

8. The International Rules, *see* 33 U.S.C. § 1602 number 1 through 38.

Rule 3(a) states that:

> (a) The word 'vessel' includes every description of water craft, including nondisplacement craft and seaplanes, used or capable of being used as a means of transportation on water.

Rule 3(e) states that:

> (e) The word 'seaplane' includes any aircraft designed to manoeuvre on the water.

Rule 31 reflects peculiar concern with seagoing aircraft:

> Where it is impracticable for a seaplane to exhibit lights and shapes of the characteristics or in the positions prescribed in the Rules of this Part *she* shall exhibit lights and shapes as closely similar in characteristics and position as is possible. (emphasis supplied).

33 U.S.C. § 1601(1) leaves no doubt that all kinds of seagoing aircraft are included within the term "vessel". It states:

> 'vessel' means every description of watercraft, including nondisplacement craft and seaplanes, used or capable of being used as a means of transportation on water. . . .

A helicopter comes within the statutory definition of a "nondisplacement craft" and certainly fits the qualification of a craft "used or capable of being used as a means of transportation on water." *Id.* As a statutorily defined "vessel", a helicopter is also subject to the elaborate system set up in 33 U.S.C. § 1608 for civil penalties. There, investigative, enforcement and comprehensive measures are provided, including liability of an operator of a vessel and an *in rem* remedy against the craft.

Whatever Congress had or could have had in mind regarding the term "vessel" in 1920 when it first enacted the Jones Act, it is now clear in 1982 and has been ever since 1977 that Congress has no doubts. Congress means to include any and all kinds of seagoing aircraft within the term "vessel", with the sole qualification that the craft be used *or capable of being used* for transportation on or over international waters, which these clearly were, or other waters over which the United States has jurisdiction.

One final note on the term "vessel". The Court stresses that in *Robison* we were concerned with "special purpose structures" which are designed to float and be towed "across water to the drilling site despite their incapacity for *self-propulsion.*" 684 F.2d at 1113. Wave barriers permanently affixed to the sea floor, *Nelson*, 639 F.2d

469, the elevated boom of a dragline, *Guidry*, 614 F.2d 447, and a submersible oil storage facility, *Hicks*, 512 F.2d 817, and the "Texas Tower" for radar defense of the nation, *Gianfala*, 356 U.S. 252, 2 L.Ed.2d 737, 78 S.Ct. 687, hardly fit that category.

Nor does fidelity to the principles of *Robison* require that the flexible maritime law's concern for those who go down to sea, *see* Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 39 L.Ed.2d 9, 94 S.Ct. 806 (1974) (following *Moragne*)—whether in ships or today's version of the ship's equivalent—should be denied effectuation of the admiralty remedy which Kolb and all other helicopter pilots, including Barger, have, because the thing—the helicopter—whose use for substantial maritime purposes gives the controversy the prized characterization of a maritime claim, is not a vessel.[9]

I must therefore dissent.

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9. That ascribing vessel status to a helicopter leaves some legal problems unanswered, *see* 684 F.2d at 1114 (limitation of liability, etc.), is no deterrence to the admiralty's adaptability. Recall, for example, that in the boundless *Sieracki* claims, founded on traditional seamen's work, longshoremen never received maintenance and cure. Seas Shipping Co. v. Sieracki, 328 U.S. 85, 90 L.Ed. 1099, ____S.Ct. ____ (1946).

APPENDIX B

Denyse Nettune Jordan SMITH, etc.,
Plaintiff-Appellant,

v.

PAN AIR CORP., et al.,
Defendants-Appellees.
Martha KOLB, etc., Plaintiff-Appellant,

v.

TEXACO, INC. and Pool Offshore Co.,
Defendants-Appellees.

PETROLEUM HELICOPTERS, INC. and
American Home Assurance Co.,
Plaintiffs-Appellants,

v.

POOL COMPANY OF TEXAS,
Defendant-Appellee.

Nos. 81-3522, 81-3675 and 81-3638.

United States Court of Appeals,
Fifth Circuit.

Aug. 23, 1982.

Suits were brought arising from two separate aircraft crashes. In one case, the United States District Court for the Eastern District of Louisiana, at New Orleans, George Arceneaux, Jr., J., granted one defendant's motion to dismiss all admiralty claims against it, and appeal was taken. In cases arising from the other crash, the United States District Court for the Western District of Louisiana,

at Lafayette-Opelousas, John M. Shaw, J., dismissed admiralty claims for death of pilot and loss of aircraft, and appeals were taken. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) claim for death of pilot of seaplane which crashed in an inland Louisiana marsh was not within maritime jurisdiction; (2) the seaplane was not a "vessel" and thus its pilot was not a "seaman" and his survivors were not entitled to bring claims under the Jones Act; (3) claim for death of helicopter pilot in crash of helicopter into the Gulf of Mexico was within admiralty jurisdiction; (4) admiralty jurisdiction over claim against nonemployer third parties for death of the helicopter pilot was not ousted by the Outer Continental Shelf Lands Act, though crash occurred after rotor blade of helicopter struck crane ball on fixed platform on the outer continental shelf to which the helicopter had delivered a passenger; and (5) property damage claim with respect to the helicopter could also be brought in admiralty.

Affirmed as to claims arising from seaplane crash; reversed and remanded as to claims arising from helicopter crash.

Orlando G. Bendana, Wayne H. Carlton, Jr., New Orleans, La., for Smith.

Robert T. Myers, Brad G. Theard, Lawrence E. Abbott, New Orleans, La., for Pan Air Corp.

Lemle, Kelleher, Kohlmeyer & Matthews, New Orleans, La., for Southeastern Aviation Underwriters, Inc.

Bailey & Leininger, B. Ralph Bailey, Donald D. Bann, Metairie, La., Arthur Crais, New Orleans, La., for Shell Oil Co.

Lugenbuhl, Larzelere & Ellefson, Russell D. Pulver, Lemle, Kelleher, Kohlmeyer & Matthews, New Orleans, La., for Kolb.

Domengeaux & Wright, Wm. P. Rutledge, Lafayette, La., for Petroleum Helicopters, Inc., et al.

Caffery, Qubre & Duzar, Patrick T. Caffery, New Iberia, La., for Texaco, Inc.

Johnson & McAlpine, Ronald A. Johnson, John F. Colowich, New Orleans, La., for Pool Offshore.

Appeal from the United States District Court for the Western District of Louisiana.

Before RUBIN, REAVLEY and TATE, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge.

The scope of admiralty jurisdiction over suits arising from aircraft crashes has never been fully explored by this Circuit. These cases require us to consider the extent of that jurisdiction. If there is jurisdiction, some of the cases also involve the effect of the Outer Continental Shelf Lands Act on such suits. Finally, one case raises the question whether an aircraft is a "vessel" for Jones Act purposes.

We first sketch briefly the facts in each case.

I.

81-3522 Smith v. Pan Air Corp.

Curtis C. Jordan was a pilot regularly engaged in flying a plane to transport passengers engaged in mineral exploration and development activity to and from locations

in Louisiana and off its shores. Using a plane equipped to take off from either land or water, he departed from the New Orleans Lakefront Airport with two passengers, one of them to be taken to a Shell Oil Company mineral operation located in Louisiana near the mouth of the Mississippi River. It was not practicable, however, to reach Shell's site by land travel. Using water flotation equipment, Jordan landed in a canal adjacent to Shell's facilities. After the Shell-bound passenger disembarked, Jordan took off from the canal, and almost immediately encountered a fog bank. Trying to escape the fog, he came dangerously close to an antenna tower owned by Shell. Although Jordan succeeded in avoiding the tower, the plane struck a set of its supporting guy wires and crashed onto Louisiana soil, killing Jordan instantly.[1] Invoking Fed.R.Civ.P. 9(h), his widow and child seek damages in admiralty for his death from his employer, Pan Air, contending that the plane was a "vessel" and that Jordan was a member of its crew, hence entitled to the benefits of the Jones Act, 46 U.S.C. § 688 (1976). The plaintiffs also assert maritime tort claims for the alleged unseaworthiness of the plane. Finally, they invoke diversity jurisdiction to support claims against Pan Air for the alleged defective and unreasonably dangerous nature of the aircraft, and against Shell for "gross negligence".[2] Finding claims arising from the aircraft crash not to be within its maritime jurisdiction, the district court granted Pan Air's motion to dismiss all "admiralty claims" against

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1. The second passenger was also killed in the crash. The claim for damages arising out of his death has been dismissed.

2. It is not clear from the record whether this claim is also intended to be within admiralty jurisdiction, or is based only on diversity.

it.[3] In his opinion, the judge also concluded that Jordan was not a Jones Act seaman.

81-3675 Kolb v. Texaco, Inc.

81-3638 Petroleum Helicopters, Inc. v. Pool Co.

Walter Kolb was a helicopter pilot regularly engaged in transporting workers and equipment from the Louisiana mainland to and between drilling rigs and platforms located in the Gulf of Mexico. He was assigned to transport a passenger to work on a fixed platform located on the outer Continental Shelf, owned by Texaco, whose well was being "worked over" by Pool Company. A crane owned by Texaco was situated on the platform; its crane arm extended over the Gulf, and a crane ball hung from the crane arm. After landing on the helipad and discharging the passenger, Kolb took off from the platform. As he departed, the helicopter's main rotor blade struck the crane ball, causing the helicopter to crash into the Gulf. Mrs. Kolb sued Texaco and the other company engaged in work on the platform in admiralty for damages sustained as a result of her husband's death; Petroleum Helicopters sought recovery, also in admiralty, for the loss of its aircraft. Mrs. Kolb has abandoned any claim under the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356 (1976 & Supp. III 1979) (OCSLA), that would be determined by the application of Louisiana law. Petro-

3. Thus, the plaintiffs' diversity claims against Pan Air, as well as all claims against Shell, *see* note 2 *supra*, are still pending. The district judge's granting of Pan Air's motion to dismiss the admiralty claims is nevertheless an appealable order under 28 U.S.C. § 1292(a)(3). Of course, to the extent that plaintiffs' claim against Shell is grounded in admiralty, our reasoning with regard to the admiralty claims against Pan Air is equally applicable.

leum Helicopters invokes diversity as well as admiralty jurisdiction. The district judge dismissed both claims, insofar as they invoked admiralty jurisdiction, for want of jurisdiction.[4]

II.

In 1813, Justice Story, on Circuit, stated that "[i]n regard to torts . . . the jurisdiction of the admiralty is exclusively dependent upon the locality of the act."[5] The federal courts, therefore, defined the scope of maritime jurisdiction over tort claims solely by reference to locality until the Supreme Court reset the compass, at least with regard to claims arising out of aircraft crashes, in 1972. In *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972), the Court first considered whether the principles formulated a century and a half earlier for those who go down to the sea in ships apply to air transportation. We, therefore, examine that decision with care.

Justice Stewart, writing for a unanimous court, spelled out the holding of *Executive Jet* in concluding the opinion: "in the absence of *legislation to the contrary*, there is no federal admiralty jurisdiction over aviation tort claims arising from flights by *land-based aircraft between points within the continental United States.*" *Id.* at 274, 93 S.Ct. at 507, 34 L.Ed.2d at 471 (emphasis added). This holding does not directly dispose of any of the claims under review here, but its underlying rationale is crucial

4. Petroleum Helicopters's diversity claim is still pending in district court. Mrs. Kolb has apparently renounced any claim other than for negligence under general maritime law.

5. *Thomas v. Lane*, 23 F.Cas. 957, 960 (C.C.D. Me. 1813) (No. 13,902).

and the quoted language suggests three of the questions we must consider: (1) What is "legislation to the contrary"? (2) What is the meaning of the restrictive adjectival phrase, "land-based aircraft"? (3) Does jurisdiction extend to flights that are to or from points outside the continental land mass?

A. The *Smith* Claim

At the outset, we note that the *Smith* claim comes closest of those under review to falling directly under *Executive Jet's* holding. No assertion has been made that "legislation to the contrary"[6] exists to bring the *Smith* plaintiffs' claim within the admiralty jurisdiction. Furthermore, the flight that crashed was apparently "between points within the continental United States."[7] Therefore, if Jordan's aircraft were considered "land-based," it is at least possible[8] that the district judge could have dismissed the Smiths' admiralty claims under the literal language of *Executive Jet* in its narrowest possible reading. For the purposes of this appeal, however, we assume that Jordan's seaplane, which was capable both of landing on and taking off from water in normal, nonemergency use, was not a "land-based" aircraft. Therefore, to decide this

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6. For our discussion of "legislation to the contrary" relevant to these cases, see Part IIB *infra*.

7. The flight that Jordan had just completed was between New Orleans and Shell's facility, on land, near the mouth of the Mississippi River—clearly "between points within the continental United States." Apparently, Jordan was returning to the New Orleans airport when he crashed. Whether this is so, however, is immaterial, because we find that there is no admiralty jurisdiction over the *Smith* claim on a ground that would not be affected by the correctness of this assumption. *See* text *infra*.

8. *See* note 7 *supra*.

case, we go beyond *Executive Jet's* precise holding to its underlying rationale.

Smith argues that admiralty jurisdiction extends to all claims having a functional relationship to maritime commerce, regardless of the locality of the tort. In *Executive Jet*, a jet aircraft struck a flock of seagulls during takeoff from a Cleveland, Ohio, airport and crashed into Lake Erie. The plaintiffs sought to maintain a suit in admiralty because the plane had crashed into navigable waters. The Supreme Court first discussed the serious difficulties with the traditional test for admiralty jurisdiction because of that test's focus solely on the locality of the accident. The Court noted the difficulty of applying that test in "perverse and casuistic borderline situations;" the virtual absurdity of applying the test, and the "full panoply of the substantive admiralty law," to injuries to swimmers at a public beach; and the inadvisibility of turning jurisdiction on the fortuity that the aircraft finally hit land rather than navigable water, or *vice versa*.[9] After considering observations by courts, commentators, and the American Law Institute and discussing congressional extension of admiralty jurisdiction to land structure injuries caused by vessels, the Court stated: "in determining whether there is admiralty jurisdiction over a particular tort or class of torts, reliance on the relationship of the wrong to traditional maritime activity is often more sensible and more consonant with the purposes of maritime law than is a purely mechanical application of the locality test."[10]

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9. *See generally Executive Jet, supra,* 409 U.S. at 253-60, 93 S. Ct. at 497-501, 34 L.Ed.2d at 458-62.

10. *Id.* at 261, 93 S.Ct. at 501, 34 L.Ed.2d at 463.

[1] Some commentators, suggesting deficiencies and inconsistencies in any test that relies on locality at all, read *Executive Jet* as commanding, or at least permitting, the determination of admiralty jurisdiction solely by the relationship of the "wrong" to traditional maritime activity.[11] They note that, for example, the traditional maritime remedy of maintenance and cure has always been extended to disabilities arising from injuries suffered on land; that the Admiralty Extension Act expands maritime jurisdiction to include damage to land structures caused by vessels on navigable waters; and that "the doctrine of unseaworthiness has been extended to permit a seaman or a longshoreman to recover from a ship owner for injuries sustained wholly on land, so long as those injuries were caused by defects in the ship or its gear."[12]

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11. *See, e.g.*, Note, *Admiralty Jurisdiction*: Executive Jet *in Historical Perspective*, 34 Ohio St.L.J. 353, 369-70 (1973); Note, *The Other Half of Executive Jet: The New Rationality in Admiralty Jurisdiction*, 57 Tex.L.Rev. 977 (1979); Comment, *Admiralty Tort Jurisdiction: Floundering on the Sea of Inconsistency*, 27 U.Fla.L.Rev. 805, 815-17 (1975); *Recent Developments—Admiralty Tort Jurisdiction—Tort Claims Not Within Admiralty Jurisdiction Unless Requisite Maritime Nexus Exists*, 27 Vand.L.Rev. 343 (1974) (conceding maritime locality should at least be factor).

12. *Executive Jet, supra*, 409 U.S. at 260, 93 S.Ct. at 500, 34 L.Ed.2d at 462-63 (citing *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206, 214-15, 83 S.Ct. 1185, 1190-91, 10 L.Ed.2d 297, 303-04 (1963)). In addition, of course, the Jones Act extends to injuries suffered by a crew member in the course and scope of his employment, even on land. *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 63 S.Ct. 488, 87 L.Ed. 596 (1943); *Vincent v. Harvey Well Serv.*, 441 F.2d 146 (5th Cir. 1971). Such claims are within the admiralty jurisdiction only by virtue of specific congressional extension of that jurisdiction to them. *See O'Donnell, supra*, 318 U.S. at 40-41, 63 S.Ct. at 490-91, 87 L.Ed. at 600-01; *see also Panama R. v. Johnson*, 264 U.S. 375, 386-91, 44 S.Ct. 391, 393-95, 68 L.Ed. 748, 752-54 (1924). The Outer Continental Shelf Lands Act, which we consider more fully below, depends on national sovereignty and the commerce clause; the cause of action it creates is one arising out of a general

[2] There are, however, patent difficulties in determining what kinds of "wrong" are related to traditional maritime activities. If we define the "wrong" as the negligent act, then it is difficult to see how defects in the design of an aircraft, faults in its manufacture or maintenance, or pilot error are maritime. Yet we, as well as other courts, have asserted admiralty jurisdiction over such claims.[13] Those who advocate a "relationship of the wrong" test really look not to the kind of wrong but to the nature of the activity in which the victim and his aircraft are engaged.

Moreover, nothing in *Executive Jet* indicates that the Court adopted such a functional test. Instead, the entire thrust of the opinion is that locality *alone* cannot support jurisdiction over maritime torts and that something more is required. Thus, in reviewing commentary, the

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federal statute, and federal court jurisdiction depends on the existence of a federal question, 28 U.S.C.A. § 1331 (West Supp. 1982), not admiralty. *See e.g., In re Dearborn Marine Serv., Inc.*, 499 F.2d 263, 270 (5th Cir. 1974).

13. *See, e.g., Higginbotham v. Mobil Oil Corp.*, 545 F.2d 422, 424 n.1, 430 (5th Cir. 1977) (stating, on page last cited, "Logic, experience and precedent compel us to reject the argument that airplane crashes ordinarily occur in the absence of default by someone connected with the *design, manufacture, or operation* of the craft") (emphasis added), *rev'd on other grounds*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978); *Hornsby v. Fish Meal Co.*, 431 F.2d 865, 866-67 (5th Cir. 1970) (pilot error); *Hubschman v. Antilles Airboats, Inc.*, 440 F.Supp. 828, 853-57 (D.V.I. 1977) (recovery against lessee and operator of seaplane, plaintiff's employer, allowed under doctrine of *res ipsa loquitur* under circumstances where negligence could only have been land-based); *cf. Roberts v. United States*, 498 F.2d 520, 522-25 (9th Cir.), *cert. denied*, 419 U.S. 1070, 95 S.Ct. 656, 42 L. Ed.2d 665 (1974) (claim in admiralty would have been allowed against United States for alleged negligent direction of landing of decedent's aircraft, which crashed into sea short of runway, but for running of applicable statute of limitations).

Court said, "commentators have actively criticized the rule of locality as the *sole* criterion for admiralty jurisdiction, and have recommended adoption of a maritime relationship requirement *as well.*"[14] It continued, "this Court has never explicitly held that a maritime locality is the *sole* test of admiralty tort jurisdiction."[15] Then the Court quoted its opinion in *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52, 34 S.Ct. 733, 58 L.Ed. 1208 (1914):

> Even if it be assumed that the requirement as to locality in tort cases, *while indispensable*, is not necessarily exclusive, still in the present case the wrong which was the subject of the suit was, we think, of a maritime nature and hence the District Court, from any point of view, had jurisdiction. . . . If *more* is required than the locality of the wrong in order to give the court jurisdiction, the relation of the wrong to maritime service, to navigation and to commerce on navigable waters, was quite sufficient.[16]

In short, the *Executive Jet* Court expressed concern about "the difficulties involved in trying to apply the locality rule as the *sole test* of admiralty tort jurisdiction,"[17] concluding that "maritime locality *alone* is not a sufficient predicate for admiralty jurisdiction in aviation

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14. *Executive Jet, supra*, 409 U.S. at 257, 93 S.Ct. at 499, 34 L.Ed.2d at 461 (emphasis added).

15. *Id.* at 258, 93 S.Ct. at 499, 34 L.Ed.2d at 461 (emphasis added).

16. *Id.* at 258, 93 S.Ct. at 499, 34 L.Ed.2d at 461 (emphasis added) (quoting *Atlantic Transport, supra*, 234 U.S. at 61, 62, 34 S.Ct. at 735, 58 L.Ed. at 1212-13).

17. 409 U.S. at 259, 93 S.Ct. at 500, 34 L.Ed.2d at 462 (emphasis added).

tort cases."[18] The Court referred to the criterion it was rejecting as the *"locality-alone* test,"[19] and stated, "the mere fact that the alleged wrong 'occurs' or 'is located' on or over navigable waters—whatever that means in an aviation context—is not *of itself* sufficient to turn an airplane negligence case into a 'maritime tort.' It is far more consistent with the history and purpose of admiralty to require *also* that the wrong bear a significant relationship to traditional maritime activity."[20]

After these cases were briefed and argued, the Supreme Court decided that admiralty jurisdiction extends to the collision of two pleasure boats on navigable waters. *Foremost Insurance Co. v. Richardson,* ____U.S.____, 102 S.Ct. 2654, 2660, 73 L.Ed.2d 300 (1982), *aff'g* 641 F.2d 314 (5th Cir. 1981). Although it stated, "the *Executive Jet* requirement that the wrong have a significant connection with traditional maritime activity is not limited to the aviation context," ____ U.S. at ____, 102 S.Ct. at 2658, the Court quoted our opinion in *Richardson* for the proposition that "admiralty, jurisdiction requires *more* than the occurrence of the tort on navigable waters—. . . *additionally* there must be a significant relationship between the wrong and traditional maritime activity.' " *Id.* at ____, 102 S.Ct. at 2657 (emphasis

18. *Id.* at 261, 93 S.Ct. at 501, 34 L.Ed.2d at 463 (emphasis added).

19. *Id.* at 265, 93 S.Ct. at 503, 34 L.Ed.2d at 466 (emphasis added).

20. *Id.* at 268, 93 S.Ct. at 504, 34 L.Ed.2d at 467 (emphasis added). The Court also repeated its earlier warning in *Victory Carriers, Inc. v. Law,* 404 U.S. 202, 212, 92 S.Ct. 418, 425, 30 L.Ed.2d 383, 391 (1971), that "in determining whether to expand admiralty jurisdiction 'we should proceed with caution. . . .' " 409 U.S. at 272, 93 S.Ct. at 506, 34 L.Ed.2d at 470.

added) (quoting *Richardson*, 641 F.2d at 315). These comments in both *Executive Jet* and *Richardson* lead ineluctably to the conclusion that maritime locality is still an indispensable element of maritime jurisdiction, an interpretation we have already adopted. *See, e.g., Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co.*, 644 F.2d 1132, 1135 (5th Cir.), *cert. denied*, ___ U.S.___, 102 S.Ct. 635, 70 L.Ed.2d 615 (1981); *Moser v. Texas Trailer Corp.*, 623 F.2d 1006, 1009, *modified per curiam in other respects*, 630 F.2d 249 (5th Cir. 1981).

[3] We conclude, therefore, that, because the *Smith* claim arose from the crash of an aircraft in an inland Louisiana marsh, the district court properly dismissed it for want of maritime jurisdiction.

B. The *Kolb* Claim

[4] We next turn to the death claim in *Kolk*, which arose out of a helicopter crash on the high seas over the outer Continental Shelf. In this case, we consider the meaning of the Court's observation in *Executive Jet* that admiralty jurisdiction is not conferred in aviation cases absent, "legislation to the contrary." We conclude that the Court's discussion in *Executive Jet, supra*, 409 U.S. at 274, 93 S.Ct. at 507, 34 L.Ed.2d at 471, of "legislation to the contrary" and its illustration of such legislation by reference to the Death on the High Seas Act, 46 U.S.C.A. §§ 761-768 (West 1975 & Supp. 1982) (DOHSA), indicate that the *Kolb* claim is within the admiralty jurisdiction.

DOHSA, enacted in 1920 to overrule *The Harrisburg*, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358 (1886), pro-

vides a cause of action for "the death of a person . . . caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore[s] of . . . the United States."[21] While the Act says nothing about the jurisdiction of federal courts, the Court, with apparent approval, noted in *Executive Jet* that federal courts have repeatedly sustained maritime jurisdiction over such cases.[22] As the Court further noted, DOHSA has not been limited by its literal terms to wrongful acts on the high seas but extends to "torts . . . with a maritime locality, in that the alleged negligence became operative while the aircraft was on or over navigable waters, and also with some relationship to maritime commerce, at least insofar as the aircraft was beyond state territorial waters and performing a function—transaceanic crossing —that previously would have been performed by waterborne vessels."[23] Thus, the Court concluded on this point: "[U]nder the Death on the High Seas Act, a wrongful-death action arising out of an airplane crash on the high seas beyond a marine league from the shore of a State may clearly be brought in a federal admiralty court."[24]

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21. Section 761 reads in pertinent part as follows:
Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty. . . ."
46 U.S.C. § 761 (1976).

22. *See* cases cited in *Executive Jet, supra,* 409 U.S. at 263 & n. 13, 93 S.Ct. at 502 & n.13, 34 L.Ed.2d at 464 & n.13.

23. *Executive Jet, supra,* 409 U.S. at 264, 93 S.Ct. at 502, 34 L. Ed.2d at 465.

24. *Id.* at 271 n.20 93 S.Ct. at 506 n.20, 34 L.Ed.2d at 469 n.20.

The *Kolb* death claim, then, could ordinarily be asserted in admiralty simply by virtue of the fact that it arose from an aircraft crash "on the high seas beyond a marine league from the shore of a State." But because Kolb's accident occurred on the outer Continental Shelf, we must determine the effect, if any, of the provisions of the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356 (1976 & Supp. III 1979) (OCSLA).

OCSLA makes the law of adjacent states, to the extent such law is not inconsistent with federal law, applicable as "surrogate" federal law to the subsoil and seabed of the outer Continental Shelf and to the platforms erected thereon.[25] In 1969, the Supreme Court decided, in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969), that accidents occurring on fixed platforms located on the outer Continental Shelf are governed by the OCSLA, which "deliberately eschewed the application of admiralty principles" to platforms; that Act requires the application of state law. 395 U.S. at 355, 365-66, 89 S.Ct. at 1837, 1842, 23 L.Ed.2d at 369-70. While *Rodrigue* deals solely with the body of substantive law applicable to platform-related accidents, not with the jurisdiction of an admiralty court to entertain the action and to apply state law prin-

25. 43 U.S.C. § 1333(a) (Supp. III 1979) provides, in relevant part:

> (2)(A)To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf. . . .

ciples, the opinion appears to assume that admiralty jurisdiction entails the governance of admiralty substantive law.[26] In reaching the conclusion that DOSHA did not apply, the Court repeatedly referred to accidents occurring "on" fixed platforms,[27] and, indeed, most cases decided under the *Rodrigue* principle involve an accident which occurred, and an injury which was sustained, "on" the platform.[28] In several cases, however, we have applied OCSLA and, consequently, state law, to incidents in which platform workers who were the victims of torts originating on these artificial islands were not actually injured or killed until they fell, jumped, or were pushed

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26. The Court, for example, observed:

> Thus the *admiralty action* under the Seas Act no more applies to these accidents actually occurring on the islands than it would to accidents occurring in an upland federal enclave or on a natural island to which admiralty *jurisdiction* had not been specifically extended. At a minimum, the legislative history shows that accidents on these structures, which under maritime principles would be no more under *maritime jurisdiction* than accidents on a wharf located above navigable waters, were not changed in character by the Lands Act.

395 U.S. at 366, 89 S.Ct. at 1842, 23 L.Ed.2d at 370 (emphasis added). We, therefore, assume that admiralty jurisdiction is lacking if the substantive law applicable is OCSLA-imposed state law.

27. *See, e.g.*, 395 U.S. at 366, 89 S.Ct. at 1842, 23 L.Ed.2d at 370 ("Thus the admiralty action under [DOHSA] no more applies to those accidents *actually occurring on the* [*artificial*] *islands* than it would to accidents occurring . . . *on* a natural island to which admiralty jurisdiction had not been specifically extended. At a minimum, the legislative history shows that accidents *on* these structures, which under maritime principles would be no more under maritime jurisdiction than accidents on a wharf located above navigable waters, were not changed in character by the [OCSLA].") (emphasis added).

28. *See, e.g., Bonner v. Chevron U.S.A.*, 668 F.2d 817, 818 (5th Cir. 1982); *Alford v. Pool Offshore Co.*, 661 F.2d 43, 44-45 (5th Cir. 1981); *Terry v. Raymond Int'l, Inc.*, 658 F.2d 398, 400, 404-45 (5th Cir. 1981), *cert. denied*, __U.S.__, 102 S.Ct. 1975, 72 L.Ed.2d 443 (1982); *Ramos v. Liberty Mut. Ins. Co.*, 615 F.2d 334, 336 & n.1 (5th Cir. 1980), *cert. denied*, 449 U.S. 1112, 101 S.Ct. 921, 66 L.Ed.2d 840 (1981).

into the surrounding seas.[29] In each of these cases, the injured party was a platform worker and the original impact occurred on the platform.

We have applied OCSLA-dictated state law in only one case in which a platform worker was injured by a tort whose initial impact was not sustained on the platform. In *In re Dearborn Marine Service, Inc.*, 499 F.2d 263 (5th Cir. 1974), *cert. dismissed*, 423 U.S. 886, 96 S.Ct. 163, 46 L.Ed.2d 118 (1975), a platform worker, Monk, was on a "standby" vessel tied up seventy-five feet from a platform when an explosion occurred on the platform. With the explosion, a "flaming ball of oil" rose above the platform. Carried by the wind, the ball of fire engulfed the standby vessel, killing all aboard. Monk's heirs sought to maintain a suit against the platform defendants for negligence under the DOHSA and general maritime law. The district court sustained admiralty jurisdiction over these claims. We reversed, concluding that "§ 1333(a)(2) of the [OCSLA], when read against the background of legislative history outlined in *Rodrigue* and the increasing judicial and legislative dissatisfaction with strict locality as the sole test of jurisdiction, precludes us from treating Monk's claim against [the platform defendants] as a suit in admiralty." 499 F.2d at 276.[30]

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29. *See, e.g., Oliver v. Aminoil, USA, Inc.*, 662 F.2d 349 (5th Cir. 1981) (per curiam); *Bible v. Chevron Oil Co.*, 460 F.2d 1218 (5th Cir.), *cert. denied*, 409 U.S. 984, 93 S.Ct. 325, 35 L.Ed.2d 248 (1972); *Bertrand v. Forest Corp.*, 441 F.2d 809 (5th Cir.), *cert. denied*, 404 U.S. 863, 92 S.Ct. 106, 30 L.Ed.2d 107 (1971). In *Rodrigue* itself, one of the decedents, Dore, was killed when he fell into a barge moored next to the platform. *Rodrigue, supra*, 395 U.S. at 353, 89 S.Ct. at 1836, 23 L.Ed.2d at 363.

30. However, we sustained Monk's admiralty claims against the owner of the standby vessel, as well as the admiralty claims of the

Texaco and Pool argue that Kolb's claim against them is indistinguishable from Monk's claim against the platform defendants in *Dearborn,* in that in both cases, platform-based negligence had its first impact on the decedent on or over the high seas and not on the platform. Although the two situations are alike in that regard, there is a critical difference between Monk's status as a "platform worker" and Kolb's status as the pilot of an aircraft in navigation.

[5] The basic thrust of the *Dearborn* opinion holding Monk limited to state law remedies (as against the platform defendants) is that Monk, as a platform worker, was only fortuitously on a vessel at the time of the explosion and that, otherwise, there was virtually nothing to distinguish between him and his fellow platform-workers who perished on the platform.[31] Kolb, by contrast, cannot be considered a "platform worker" under any standard. Instead, his duties constantly carried him back and forth above the high seas over the outer Continental Shelf. Moreover, Kolb's death claim, considered apart from its

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captain and crew members of that vessel against the platform defendants. *See* 499 F.2d at 276, 286.

31. [C]oncerns about the close relationships between *platform workers* and their adjacent states and about the non-maritime character of platform operations indicate to us that Congress did not intend that application of state law necessarily should cease at the physical boundaries of the platform. The same concerns may be equally applicable to accidents fortuitously consummated in the surrounding sea. While Monk's death occurred on the high seas, there is little to choose between his relationship to the adjacent state and those of his *fellow platform workers.* He was by all standards a *platform worker.* The time he spent aboard the [standby ship] was primarily in pursuit of such platform-related duties as filling out work reports and communicating with his shoreside office.

Dearborn, supra, 499 F.2d at 273 (emphasis added).

relationship to the OCSLA,[32] was clearly within admiralty jurisdiction. As we have already noted, the simple fact that Kolb's death occurred as a result of an aircraft crash into the high seas is alone enough to confer jurisdiction under the DOHSA. Even apart from this "special treatment" accorded airplane crash victims, there would still be admiralty jurisdiction over Kolb's accident, as we show below in regard to Petroleum Helicopters' property claim arising from this same accident. *See* Part IIC *infra.* In products liability cases, admiralty jurisdiction has repeatedly been extended to cases in which death or injury occurred on navigable waters even though the wrongful act occurred on land.[33] The place where the negligence or

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32. *Cf. Kimble v. Noble Drilling Corp.*, 416 F.2d 847 (5th Cir. 1969, *cert. denied*, 397 U.S. 918, 90 S.Ct. 924, 25 L.Ed.2d 99 (1970). There, we upheld admiralty jurisdiction over a seaman's injury claim even though the injury was received on a fixed platform.

> The Outer Continental Shelf Lands Act *does not oust admiralty law having a basis of applicablity independent from the location of the platforms at sea;* indeed, it specifically provides that the general law of the upland state is made the applicable federal law *only to the extent* that it is "not inconsistent with * * * other Federal laws." In *Rodrigue,* the Supreme Court recognized this limitation. It simply reversed a holding that the Death on the High Seas Act applied to workmen on oil platforms at sea because "the Seas Act does not apply of its own force under admiralty principles" to men working on land. The case at bar is distinguishable in that the Jones Act and the general maritime law do apply of their own force here, they would still apply, in fact, even if we assumed that Kimble received his injuries in the heart of the Louisiana mainland, so long as he was acting at the time as a seaman in the service of his ship.

416 F.2d at 850 (first emphasis added).

33. *See, e.g., Sperry Rand Corp. v. RCA,* 618 F.2d 319 (5th Cir. 1980); *Pan Alaska Fisheries, Inc. v. Marine Constr. & Design Co.,* 565 F.2d 1129 (9th Cir. 1977); *cf. Kelly v. Smith,* 485 F.2d 520 (5th Cir. 1973) (admiralty jurisdiction sustained over injury to boaters on the Mississippi River as a result of gunfire ashore), *cert. denied,* 416 U.S. 969, 94 S.Ct. 1991, 40 L.Ed.2d 558 (1974).

wrongful act occurs is not decisive. The place injury occurs and the function the injured person was performing at the time are more significant. In these respects, the *Kolb* claim is different from Monk's claim in *Dearborn* and similar to the claims of the vessel's captain and crew members in that case. Unlike both Monk and the workers considered in *Rodrigue*, the helicopter pilot was engaged in a maritime-type function, transporting persons over the seas.[34]

[6] We hold, therefore, that admiralty jurisdiction over Kolb's claim against nonemployer third parties[35] is not ousted by section 1333(a) of the OCSLA.

C. The Property Damage Claim

Petroleum Helicopters' claim for property damage to its helicopter, sustained as a result of the same accident which claimed Kolb's life is patently not affected by DOHSA. In *Executive Jet*, the Supreme Court left open the question of jurisdiction over a tort claim arising in the course of an aircraft's performance of a "function traditionally performed by waterborne vessels."[36] It referred to situations in which such jurisdiction might be arguable: a plane flying from New York to London that crashed in mid-Atlantic[37] and the mid-air collosion of two aircraft used in spotting schools of fish resulting in

34. *See Ledoux v. Petroleum Helicopters, Inc.*, 609 F.2d 824 (5th Cir. 1980) (per curiam), discussed in Part IIC, *infra*.

35. The question of the effect of the OCSLA on an admiralty claim brought against a decedent's employer is pending before the court.

36. *Executive Jet, supra*, 409 U.S. at 271, 93 S.Ct. at 506, 34 L.Ed.2d at 469.

37. *Id.*

the "crash of those aircraft *into* the Gulf of Mexico *within* one marine league of the Louisiana shore."[38]

[7] The logic of *Executive Jet* appears to require extension of admiralty jurisdiction to nondeath claims arising on the high seas if the aircraft flight has the essential maritime nexus. Not only is the locality-plus criterion met, but judicial economy is also accompanied by submitting claims arising out of the same event to the same forum. While high seas injuries may occur without death, the *Kolb-Petroleum Helicopters* case is not atypical in that both death and property damage claims are presented.

[8] The *Kolb-Petroleum Helicopters* crash had the necessary watery locality. As to the essential maritime nexus, we recently held, in *Ledoux v. Petroleum Helicopters, Inc.*, 609 F.2d 824, 824 (5th Cir. 1980) (per curiam), that the "crash of [a] helicopter, while it [is] being used to place of a vessel to ferry personnel and supplies to and from offshore drilling structures, bears the type of significant relationship to traditional maritime activity which is necessary to invoke admiralty jurisdiction." Therefore, both the locality and maritime nexus requirements being met, we hold that the *Petroleum Helicopters* claim, like the *Kolb* death claim, may be brought in admiralty.

III.

[9, 10] As we have noted, admiralty jurisdiction for Jones Act purposes, as opposed to admiralty jurisdiction over claims asserted under the general maritime law, ex-

38. *Id.* at 271 n. 22, 93 S.Ct. at 506 n.22, 34 L.Ed.2d at 469 n. 22 (emphasis added). The example suggests the necessity of a watery locality, buttressing our conclusion in Part IIA.

tends to injuries sustained on land. *See* note 12 *supra.* In the *Smith* case, claims were asserted under both the Jones Act and the general maritime law, and the district court, somewhat ambiguously, dismissed all "admiralty claims" for want of subject matter jurisdiction. As we have already held, *see* Part IIA, *supra,* it was proper to dismiss the non-Jones Act admiralty claims because of the absence of a "watery locale." Because Jones Act claims may be asserted in admiralty even if the injury occurs on land, it would have been improper to dismiss them on the locality basis. As it appears, however, that the district court dismissed the Jones Act claims, not because of the absence of a maritime locality, but because it believed that Jordan was not a "seaman," *see* Part I *supra,* we deem that "dismissal" as having been on the merits for failure to state a cause of action. Thus viewing the judgment, we agree with the district court's conclusion that Jordan's seaplane was not a "vessel," and that, therefore, Jordan was not a "seaman" entitling his survivors to bring claims under the Jones Act.[39]

The Congress that enacted the Jones Act was concerned with overcoming the effects of *The Osceola,* 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760 (1903), which had denied crew members the right to relief in admiralty for injuries arising from their employer's negligence, while recognizing the traditional unseaworthiness remedy. Congress, following the example of the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1976), enacted a tort

39. *See* 46 U.S.C. § 688. Although the Jones Act speaks in terms of "any seaman," it is now universally held that such a "seaman" is equivalent to "the master or a member of the crew of any vessel." *See, e.g., Longmire v. Sea Drilling Corp.,* 610 F.2d 1342, 1345 (5th Cir. 1980).

remedy limited to members of the crew of a vessel instead of the traditional workers' compensation remedy. It can hardly be thought that, in 1920, Congress intended or believed that the term "vessel" included the primitive aircraft then in use.

[11] We recognize, however, that statutes are not confined in application to contemporary instances and that their principles are to be extended to embrace new factual situations and new technological developments. We have, therefore, held that for Jones Act purposes, the term "vessel" may include "special purpose structures not usually employed as a means of transport by water, but designed to float on water," even though such structures were not conceived of until long after the Jones Act was adopted. *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959).[40] While it cannot be gainsaid that a seaplane is "designed to float on water,"[41] it is clear that *Robison* and many cases following it[42] are concerned with

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40. *See aso* 1 U.S.C. § 3 (1976), which states:

> The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

Similarly, 46 U.S.C. § 801 (1976) defines the word "vessel" to include:

> all water craft and other artificial contrivancies of whatever description and at whatever stage of construction, whether on the stocks or launched, which are used or are capable of being or are intended to be used as a means of transportation on water.

As both these statutes derive from enactments occurring prior to the invention of the airplane, it is certain, at least, that the original enacting Congresses did not have airplanes in mind when they defined "vessel."

41. But *quaere* whether a seaplane should be thought of as a "special purpose *structure*." *Robison, supra*, 266 F.2d at 779 (emphasis added).

42. *See, e.g., Davis v. Hill Eng'g, Inc.*, 549 F.2d 314 (5th Cir. 1977) (derrick barge); *Hicks v. Ocean Drilling & Exploration Co.*,

"special purpose structures" employed by the offshore oil drilling industry that are designed to "float" and be towed across water to the drilling site despite their incapacity for *self-propulsion.*

The primary function of a seaplane, by contrast, is transportation through air, not on water.[43] The perils of the air are great but they are different from the dangers of the sea, to which those who work on water are exposed. Thus, we do not find *Robison's* language, directed to another question, dispositive. Furthermore, when Congress has legislated with seaplanes in mind, it has distinguished them from "vessels." For example, section 1509 (a) of Title 49 of the United States Code incorporates a provision of its predecessor, the Air Commerce Act of 1926, to the effect that the navigation and shipping laws of the United States, including any definition of vessels, are not to be construed to apply to seaplanes or other aircraft. 49 U.S.C. § 1509(a) (1976).

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512 F.2d 817 (5th Cir. 1975) (submersible oil storage facility), *cert. denied,* 423 U.S. 1050, 96 S.Ct. 777, 46 L.Ed.2d 639 (1976); *Neill v. Diamond M. Drilling Co.,* 426 F.2d 487 (5th Cir. 1970) (submersible drilling barge); *Producers Drilling Co. v. Gray,* 361 F.2d 432 (5th Cir. 1966) (same).

43. Justice (then Judge) Cardozo explained more than sixty years ago that an airplane designed to land and take off on water:

> [I]s, indeed, two things—a seaplane and an aeroplane. To the extent that it is the latter, it is not a vessel, for the medium through which it travels is the air . . .; [t]o the extent it is the former, it is a vessel, for the medium through which it travels is the water. . . .

Reinhardt v. Newport Flying Service Corp., 232 N.Y. 115, 118, 133 N.E. 371, 372 (1921). We need not decide whether a seaplane may ever be considered a "vessel," *e.g.,* if it were in the process of taxing, taking off or landing on *water* when an accident occurred, for here Jordan collided with a tower erected on land, and the plane crashed on land.

Virtually every court confronted with the question has decided that a seaplane is not a vessel, either under the Jones Act or in other contexts. For example, Judge Christian, in a thorough and well-reasoned opinion, decided in *Hubschman* that a seaplane is not a vessel for Jones Act purposes. 440 F.Supp. 828, 852 (D.V.I. 1977). In *Wendorff v. State*, 318 Mo. 363, 1 S.W.2d 99 (1977), the Missouri Supreme Court held that a seaplane was an aircraft, not a vessel, within the meaning of a life insurance policy clause excluding coverage for death occurring as the result of an airplane accident. Seaplanes have been held not to be vessels for purposes of the Limitation of Liability Act, 46 U.S.C. §§ 181-196 (1976). *Noakes v. Imperial Airways, Ltd.*, 29 F.Supp. 412 (S.D.N.Y. 1939); *Dollins v. Pan-American Grace Airways*, 27 F.Supp. 487 (S.D.N.Y. 1939).[44]

An airplane flying through the ozone does not appear to be a vessel within the meaning of an act addressed to the relief of seamen. The definition is not altered by the fact that the plane is equipped with gear that enables it to begin and end an airborne trip on water.

For these reasons, we conclude that, in *Smith* the Jones Act claim was properly dismissed for its lack of merit. Jones was simply not a seaman or a member of the crew of a vessel.[45]

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44. *But see Lambros Seaplane Base v. The Batory*, 215 F.2d 228 (2d Cir. 1954) (holding a seaplane to be a vessel within the admiralty jurisdiction for purposes of salvage).

45. *See Fragumar Corp. v. Dunlap*, 685 F.2d 127 (5th Cir. 1981) (discussing difference between jurisdiction and merits).

IV.

For the reasons given:

(1) The dismissal of Mrs. Smith's suit for want of jurisdiction of the non-Jones Act admiralty claims is AFFIRMED. The dismissal of the Jones Act claim is treated as a dismissal on the merits and, as such, is AFFIRMED.

(2) The dismissal of both Mrs. Kolb's and Petroleum Helicopters's claim for want of jurisdiction is REVERSED.

(3) The Kolb and Petroleum Helicopters cases are REMANDED for further proceedings consistent with this opinion.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81-2262

MARY E. BARGER,
Plaintiff-Appellee
Cross-Appellant,

v.

PETROLEUM HELICOPTERS, INC.,
Defendant-Appellant
Cross-Appellee.

Appeals from the United States District Court for the Eastern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion November 19, 1982, 5 Cir., 198__, ____F.2d____)

(January 6, 1983)

(AMENDED JANUARY 13, 1983)

Before BROWN, RUBIN and REAVLEY, Circuit Judges

PER CURIAM:

The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members

of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is also DENIED.

Before CLARK, Chief Judge, BROWN, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY and HIGGINBOTHAM, Circuit Judges.

JOHN R. BROWN, Circuit Judge, with whom POLITZ and JOHNSON, Circuit Judges, join, dissenting:

For the reasons set forth in my dissent to the panel opinion, I dissent to the failure of the Court to grant rehearing en banc.

TATE, Circuit Judge, dissenting from denial of Suggestion for Rehearing En Banc:

I join Judge Brown in dissenting from the denial of the application for en banc rehearing. Without definitely concluding now that I would reach the conclusions expressed by Judge Brown in his dissent to the panel opinion, I feel that they raise concerns of sufficient import to warrant full consideration by the entire Court on this issue of everyday importance to workers servicing our offshore oil industry.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81-2262

D.C. Docket No. B-77-180-CA

(Filed Jan. 19, 1983)

MARY E. BARGER,
Plaintiff-Appellee, Cross-Appellant,

v.

PETROLEUM HELICOPTERS, INC.,
Defendant-Appellant, Cross-Appellee.

Appeal from the United States District Court for the Eastern District of Texas

Before BROWN, RUBIN and REAVLEY,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that plaintiff-appellee pay to the defendant-appellant, the costs on appeal to be taxed by the Clerk of this Court.

November 10, 1982

BROWN, Circuit Judge, dissenting.

ISSUED AS MANDATE: Jan. 19, 1983.

APPENDIX E

[CORRECTED]

Mary E. BARGER, Plaintiff-Appellee, Cross-Appellant,

v.

PETROLEUM HELICOPTERS, INC.,
Defendant-Appellant, Cross-Appellee.

NO. 81-2262.

United States Court of Appeals,
Fifth Circuit.

Nov. 10, 1982.

Widow and children of helicopter pilot who died while transporting passengers to work on outer Continental Shelf sought damages in admiralty and also asserted maritime tort claims for alleged unseaworthiness of the helicopter. The United States District Court for the Eastern District of Texas at Beaumont, Joe J. Fisher, J., 514 F.Supp. 1199, sustained both claims and awarded damages. The pilot's employer appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that Outer Continental Shelf Lands Act applied to the helicopter pilot, and Longshoremen's and Harbor Workers' Compensation Act was exclusive remedy for those who had claims resulting from his death.

Reversed and remanded.

Brown, Circuit Judge, dissented and filed opinion.

Appeals from the United States District Court for the Eastern District of Texas.

Before BROWN, RUBIN and REAVLEY, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

This case raises many of the issues we decided in *Smith v. Pan Air Corp.*, 684 F.2d 1102 (5th Cir. 1982). We, therefore, address in detail only one issue that distinguishes this case: as to claims against a helicopter pilot's employer for the death of the pilot while transporting passengers to work on the outer Continental Shelf, is the Longshoremen's and Harbor Workers' Compensation Act the exclusive remedy? We conclude that such a pilot is not covered by the Jones Act because an aircraft is not a vessel, that the Outer Continental Shelf Lands Act applies to the pilot, and that the LHWCA is the exclusive remedy for those who have claims resulting from his death.

Walter Barger, like Walter Kolb, one of the decedents in *Smith*, was a helicopter pilot regularly engaged in transporting oil field workers and equipment from Louisiana to platforms located in the Gulf of Mexico on the outer Continental Shelf. While he was flying a helicopter carrying eleven passengers, the helicopter crashed into the Gulf forty miles offshore, killing all aboard. Barger's widow and children seek damages in admiralty for his death, from his employer, Petroleum Helicopters,[1] con-

1. Suit was also filed against Bell Helicopter Textron, a division of Textron, Inc., the manufacturer of the helicopter. Bell and the plaintiff agreed that, if Bell were cast in judgment, Bell would pay the plaintiff $225,000 and waive any right to appeal. The district judge found Bell also liable and apportioned liability 20% to Bell and 80% to Petroleum Helicopters, 514 F.Supp. 1199. Thus, no issues relating to the plaintiffs' claims against Bell are before us.

tending that Barger was a Jones Act seaman and also asserting maritime tort claims for the alleged unseaworthiness of the helicopter. After trial on the merits, the district court sustained both claims and awarded damages.

We held in *Smith* that the wrongful death claim of Kolb's beneficiaries against a third party, not the decedent's employer, arising from the crash of an aircraft into the high seas, is properly within admiralty jurisdiction by virtue of decisions so interpreting the Death on the High Seas Act, 46 U.S.C.A. §§ 761-768 (West 1975 & Supp. 1982) (DOHSA). *Smith*, 684 F.2d at 1108-12. The accident involved in *Smith* occurred on the outer Continental Shelf, but we decided that § 4(a) of the OCSLA, 43 U.S.C. § 1333(a) (Supp. IV 1980), making state law applicable as surrogate federal law to accidents occurring on fixed platforms, does not supersede the DOHSA so as to oust admiralty jurisdiction over the plaintiff's claim.[2]

The wrongful death claim in this case, unlike the Kolb claim in *Smith*, is asserted against the decedent's employer, Petroleum Helicopters. Section 4(b) of the OCSLA provides, "[w]ith respect to . . . death of an employee resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting . . . the natural resources . . . of the subsoil and seabed of the outer Continental Shelf, compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act [33 U.S.C.A.

2. *See Smith*, 684 F.2d at 1109-11. For similar reasons, we held that Petroleum Helicopter's claim for property damage arising from the same accident was likewise not ousted from admiralty jurisdiction by the OCSLA. *See id.* at 1112.

§§ 901-950 (West 1978 & Supp. 1982) (LHWCA)]." 43 U.S.C.A. § 1333(b).[3] Section 933(i) of the LHWCA provides that this compensation is the exclusive remedy of an injured employee against his employer. 33 U.S.C.A. § 933(i). Therefore, if Barger was covered by 43 U.S.C. § 1333(b), there can be no recovery against his employer under general maritime law. Even if admiralty jurisdiction existed because Barger's death resulted from an aircraft crash on the high seas, *see Smith*, 684 F.2d at 1109, recovery would be barred by § 933(i) and the claim would fail on the merits.

[1] The *Barger* plaintiffs argue that Barger was a Jones Act seaman, and therefore excluded from coverage under 43 U.S.C. § 1333(b). That section provides that the term "employee" does not include "a master or member of a crew of any vessel." 43 U.S.C. § 1333(b)(1). For the same reasons discussed in *Smith*, 684 F.2d at 1112-14, we conclude that a helicopter cannot be considered a "vessel," and, therefore, that this exclusion from LHWCA coverage does not extend to Barger.

[2] *Smith* involved several claims, Jordan, whose claim was asserted by his beneficiary (Smith), was flying a plane. Kolb and Barger were both piloting helicopters.

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3. The section continues:

For the purposes of the extension of the provisions of the Longshoremen's and Harbor Workers' Compensation Act under this section—

(1) the term "employee" does not include a master or member of a crew of any vessel . . .;

(2) the term "employer" means an employer any of whose employees are employed in [exploring for, developing, removing, or transporting by pipeline the natural resources . . . of the subsoil and seabed of the outer Continental Shelf].

43 U.S.C.A. § 1333(b) (West Supp. 1982).

Jordan's aircraft, like Barger's, had attachments enabling it to land on and take off from water. Kolb's helicopter apparently had no such attachment. But each of these aircraft, whether or not fitted with pontoons, was designed primarily to fly through the air not to travel on water. The dissent of our respected colleague apparently assumes that a helicopter sans pontoons used for the selfsame purpose, to transport personnel to and from offshore platforms, is not a vessel. Neither a plane nor a helicopter undergoes a miraculous transformation from aircraft into vessel when pontoons are attached to it, and their pilots do not by this act become members of a "vessel's" crew. The helicopter's amphibian adaptations were designed solely to permit it to take off from and land on water and to taxi on water in order to position itself for loading and unloading with a view to travel through the air. It was an aircraft that might use the surface of the water for a time to facilitate airborne commerce. An airplane does not become an automobile because it has wheels attached and can taxi on runways. The wheels no more change aircraft into land vehicles than pontoons change aircraft into vessels. Just as a vessel does not lose its nautical quality merely because it is anchored for a time to serve as a drilling platform, an aircraft does not become a vessel because it is adapted to float and taxi on the water for brief periods in order to perform incidental functions that aid in its primary mission. The Jones Act was designed to aid those who face the hazards of the sea, not the perils of the air. Barger did not meet death from a collision at sea or the action of the waves but as a result of an aircraft disaster. *See* Symposium, *Aircraft as Vessels Under the Jones Act and General Maritime Law*, 22 S. Tex. L. J. 595, 600-03 (1982).

[3] It remains only to be determined, then, whether the claim against Barger's employer is covered by the OCSLA. This depends on (1) whether Barger's death was the "result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting . . . the natural resources . . . of the outer Continental Shelf," and (2) whether Barger's employer, Petroleum Helicopters, was an "employer" within the intendment of 43 U.S.C. § 1333 (b)(2).

The first of these conditions is clearly met. In *Stansbury v. Sikorski Aircraft*, 681 F.2d 948 (5th Cir. 1982), a Chevron Oil Company employee was killed when the Chevron-owned helicopter in which he was a passenger crashed on the high seas over the Shelf. We held that the compensation act provided Stansbury's sole remedy against his employer, Chevron, because Stansbury had been inspecting work done under his supervision on a fixed rig located on the Shelf. "His work furthered the rig's operations and was in the regular course of the extractive operations on the [Shelf]. *But for those operations*, he would not have been in the helicopter. His death, therefore, occurred 'as a result of operations' as required by the OCSLA." *Id.* at 951 (emphasis added). Barger likewise would not have been killed in a helicopter crash in the Gulf of Mexico "but for" the fact that he was employed to transport eleven workers to a fixed platform on the Shelf. His work furthered mineral exploration and development activities and was in the regular course of such activities.

With respect to the second condition for OCSLA coverage, the term "employer" means "an employer any

of whose employees are employed in [operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting . . . the natural resources . . . of the outer Continental Shelf]." 43 U.S.C. § 1333(b)(2). Unlike the employer in *Stansbury*, Petroleum Helicopters, Barger's employer, was not itself engaged in mineral operations. However, helicopter transportation of men and equipment from the mainland to the offshore rigs and back plays an important role in "developing" the Shelf. This transportation is an "operation conducted . . . for the purpose of" natural resource development. Helicopter pilots involved in these operations perform the same function with respect to resource development whether employed directly by a producer or by a separate contractor, and should not be treated differently on the basis of who their immediate employer is. We decline to inject another element of inconsistency into an area already beset by more than its fair share of incongruous results.[4]

Aside from the fact that this case involves an employer and employee, the only kind of claim to which the compensation remedy applies, there is another important distinction between Barger's claim and the claim in *Smith*. The OCSLA compensation coverage provision already quoted is expansive. It extends to *every* injury or death "occurring as a result of operations . . . for the purpose of exploring for, developing, removing, or transporting

4. *See generally* Robertson, *Injuries to Marine Petroleum Workers: A Plea for Radical Simplification*, 55 Tex. L. Rev. 973, 973 (1977) ("Since the oil industry went offshore, the legal system has struggled to produce a body of injury law that is rational, fair, internally consistent, and acceptably productive of safety incentives. The result has been chaos.") (footnote omitted).

. . . natural resources." 43 U.S.C.A. § 1333(b). The state law extension clause, however, is considerably narrower, providing *only* for the application of state law to "the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon." 43 U.S.C. § 1333(a). Thus state law is made applicable only to workers in certain areas and not to all employees engaged in mineral development, while the compensation statute reaches any employee killed or injured while exploiting the Shelf's resources.

We, therefore, hold that Barger's exclusive remedy against his employer was LHWCA compensation.[5] The district court's judgment is REVERSED and the case is REMANDED for further proceedings not inconsistent with this opinion.

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5. The district court held in the alternative that, even if Barger were covered by the LHWCA, section 905(b) of that act gives a covered employee the right to bring an action against the "vessel owner" for negligence. Citing *Smith v. M/V Captain Fred*, 546 F.2d 119 (5th Cir. 1977), the court noted that the "circumstances that the vessel owner and the employer are the same entity does not preclude such an action." However, section 905(b) is simply irrelevant here unless a helicopter is a "vessel." We have concluded that it is not. *See* text *supra* and *Smith*, 684 F.2d at 1112-13. Therefore, workers' compensation remains Barger's sole remedy against his employer.

JOHN R. BROWN, Circuit Judge, dissenting:

To the dual holding[1] that the helicopter was not a "vessel" and Barger, its pilot, was not a "seaman", I must respectfully dissent.

To narrow the point of difference, I wish to make clear the extensive areas in which I am in full agreement with Judge Rubin's scholarly analysis. Without a doubt, 43 U.S.C. § 1333(b) of the Outer Continental Shelf Lands Act (OCSLA) brings into play § 933(i) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) which prescribes the exclusive remedy for injury and death cases by the Act. I quite agree that Barger's death was the "result of operations conducted on the Outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting . . . the natural resources . . . of the Outer Continental Shelf . . .", 43 U.S.C. § 1333(b), and that his employer, Petroleum Helicopters, Inc., was engaged in such operations in performing the essential service of transporting men and equipment from the mainland to the offshore rigs.

At the same time, I agree the case is not controlled by the local law of the adjacent state (Louisiana) as "surrogate" federal law under the OCSLA, 43 U.S.C. § 1333 (a)(2)(A). See text accompanying n.25, 684 F.2d at

1. The dual determination was based in effect on the almost contemporaneous holding of the Court as to the Smith claim in *Smith v. Pan Air Corporation*, 684 F.2d 1102, 1112, n. 39 (5th Cir. 1982). Of necessity, this dissent attacks that determination. Instead of concurring specially because of a decision binding on me until altered by the Court en banc, I am dissenting, since with the filing of this dissent I will seek formally rehearing en banc, F.R.A.P. Rule 35, of the instant case which will inevitably bring into question the correctness of the *Smith* decision.

1109. *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969).[2] I also agree that the Kolb claim against the third party in *Smith* for the death of a helicopter pilot in waters off the Outer Continental Shelf was a maritime claim within the jurisdiction of the admiralty. 684 F.2d 1111-12.

And I embrace wholeheartedly the Court's conclusion that the suit by the helicopter owner in the Kolb claim of *Smith* for loss of a helicopter was within the admiralty jurisdiction. *Id.* at 1112. All of this means that for the death of Barger the Longshoremen's Act is the exclusive remedy against the employer, Petroleum Helicopters, Inc., *unless* he was ". . . a master or member of the crew of [a] vessel. . . ." 43 U.S.C. § 1333(b)(1).

This dramatizes the narrow, but significant, difference in our views. The Court having held (i) in the Kolb third party death action that the claim under DOHSA was within the admiralty and it was so maritime as to be beyond the reach of adjacent surrogate law, 43 U.S.C. § 1333(a)(2)(A); and having held (ii) in the claim for the owner's loss of the helicopter that the helicopter was engaged "in a maritime-type function, transporting persons over the sea", 684 F.2d at 1111, because the aircraft was "being used in place of a vessel to ferry personnel and supplies to and from offshore drilling structures, . . ." and this bore ". . . the type of significant rela-

2. The Court states:

> Unlike both Monk and the workers considered in *Rodrigue*, the helicopter pilot was engaged in a maritime-type function, transporting persons over the seas.
>
> We hold, therefore, that admiralty jurisdiction over Kolb's claim against nonemployer third parties is not ousted by section 1333(a) of the OCSLA.

684 F.2d at 1111-12 (note omitted).

tionship to traditional maritime activity . . . necessary to invoke admiralty jurisdiction . . .", *Id.* at 1112, the case suddenly loses its admiralty character by the interposition of the Lonshoremen's Act.

It is no answer that this is what Congress has prescribed since the LHWCA provides itself that seamen are excluded. The helicopter is doing what a vessel would ordinarily do—transport persons and property to and from the mainland and the offshore structure. The pilot is doing what the master and crew of a vessel would do, namely, operate the craft. Each activity is maritime and maritime related. Each meets the exclusions and principles set forth in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972). Injury or loss to each in the OCSLA waters is within the admiralty. The factor which makes each within the admiralty is the function and purpose of the use of the craft. All that is lacking is a "vessel" in the usual traditional sense of a thing which can float on or in water to carry persons or things from one place to another.

But the normal physical characteristics to constitute an object a "vessel" have never deterred the Supreme Court or this Court from finding unusual, nontraditional, odd, nonmaritime structures to be "vessels", and the person serving to fulfill the mission of such structures to be seamen under the Jones Act.

The classic case is Judge Wisdom's celebrated decision in *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959). There, following significant Supreme Court decisions, we held an oil field "roustabout" who did not know how to, or what was meant by, the ability to "hand, reef and steer," to be a Jones Act seaman for injuries received

while a floating submersible rig was made fast to the bottom of the bay by jack-up legs raising the deck of the drilling barge way above the level of the water. At the time of the injury the drilling platform was not afloat. It was hard aground. The drilling barge could not move. The only relation it had to the sea was its past—when it was towed to a new location—or, its future—when it would again be towed to another location.

Equally spetacular was the decision in *Gianfala v. Texas Co.*, 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 775 (1955). Gianfala and his crew members slept ashore in an oilfield camp and worked aboard a drilling barge which was resting on the bottom of the bay at the time of the injury. The Court held Gianfala to be a seaman within the scope of the Jones Act. Even more spectacular was *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252, 78 S.Ct. 687, 2 L.Ed.2d 737 (1958) in which the contractor was building a "Texas tower" radar station for location in the North Atlantic to be permanently affixed to the floor of the ocean. After the tower was towed to its offshore site, Grimes did only piledriving work. He drowned when he fell out of a life ring used to carry him from a tug to the tower. The Supreme Court reversed the First Circuit and held that the "petitioner's evidence presented an evidentiary basis for a jury's finding whether or not the petitioner was a member of the crew of any vessel" to thus circumvent the equivalent of LHWCA coverage under the Defense Bases Act. *Id.* at 253, 78 S.Ct. at 688.

Courts of Appeals and District Courts have extended *Robison* to strange sorts of things to find them to be a

"vessel" and the injured person a seaman,[3] and the so called floating submersible drilling barges are invariably hard aground, incapable of any movement—maritime or otherwise.[4] As a matter of physical, operative fact they are just as land-bound, nonmaritime as the fixed raised drilling platform over which it is uncontradicted that none is a vessel.

The upshot of these decisions for our case is that because the helicopter was regularly operated in the trans-

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3. *Nelson v. United States,* 639 F.2d 469 (9th Cir. 1980) (a wave suppressor, an aquatic barrier erected in the water to protect boats at the Coast Guard station from heavy waves which is permanently affixed to the sea floor held to be a vessel and the decedent, a pile-driver, was a seaman within the Jones Act); *Guidry v. South Louisiana Contractors,* 614 F.2d 447 (5th Cir. 1980) (elevated boom of a large dragline was a vessel; case remanded for jury determination whether injured party was Jones Act seaman); *Hicks v. Ocean Drilling & Exploration Co.,* 512 F.2d 817 (5th Cir. 1975) (submersible oil storage facility resting on the bottom of the Gulf held to be a vessel and plaintiff a seaman); *Brinegar v. San Ore Construction Co., Inc.,* 302 F.Supp. 630 (E.D. Ark. 1969) (fuel tank pontoon vessel capsized at time of accident held to be a vessel and plaintiff a Jones Act seaman).

4. Submersible drilling barge cases are legion and invariably involve injuries occurring while the drilling barge is fixed on the ocean floor and not floating or in movement. *See Daughdrill v. Diamond M. Drilling Co.,* 447 F.2d 781 (5th Cir. 1971); *Neill v. Diamond M. Drilling Co.,* 426 F.2d 487 (5th Cir. 1970); *Producers Drilling Co. v. Gray,* 361 F.2d 432 (5th Cir. 1966); *Harney v. William M. Moore Building Corp.,* 359 F.2d 649 (2d Cir. 1966); *Clary v. Ocean Drilling and Exporation Co.,* 429 F.Supp. 905 (W.D. La. 1977); *McNeese v. An Son Corp.,* 334 F.Supp. 290 (S.D. Miss. 1971); *McCarty v. Services Contracting Inc.,* 317 F.Supp. 629 (E.D. La.); *Robichaux v. Kerr McGee Oil Industries, Inc.,* 317 F.Supp. 587 (W.D. La. 1970); *Rogers v. Gracey-Hellums Corp.,* 331 F.Supp. 1287 (E.D. La. 1970); *Hebert v. California Oil Co.,* 280 F.Supp. 754 (W.D. La. 1967); *Ledet v. U.S. Oil of Louisiana, Inc.,* 237 F. Supp. 183 (E.D. La. 1964); *Oliver v. Ocean Drilling & Exploration Co.,* 222 F.Supp. 843 (W.D. La. 1963); *Guilbeau v. Falcon Seaboard Co.,* 215 F.Supp. 909 (E.D. La. 1963).

portation of persons and property to and from the mainland and the offshore structures, it was engaged in maritime activities so that the loss of the helicopter and the death of the pilot were a maritime tort within the jurisdiction of the admiralty. It is maritime because of the nature of the work it regularly performed—the transportation of persons and property. This is made positive by the Court's treatment of the pilot's (*Kolb's*) claim. The Court emphasized that "his duties constantly carried him back and forth above the high seas over the outer Continental Shelf." 684 F.2d at 1111. Disregarding the relationship of the death claim to the OCSLA and the acknowledged separate jurisdiction under DOHSA, the Court went on:

> Even apart from this 'special treatment' accorded airplane crash victims, there would still be admiralty jurisdiction over Kolb's accident, as we show below in regard to Petroleum Helicopter's property claim arising from the same accident. *See* Part IIC *infra*.

Id. And after stating in Part IIC that the "logic of *Executive Jet* appears to require extension of admiralty jurisdiction to non-death claims arising on the high seas if the aircraft flight has the essential maritime nexus," *Id.* at 1112, the Court eliminating the "if", concluded:

> Therefore, both the locality and maritime nexus requirements being met, we hold that the *Petroleum Helicopters* claim, like the *Kolb* death claim, may be brought in admiralty. *Id.*

To the Court's *quaere, Id.* at 1113, n. 41, the record in this case and the trial court's factual findings clearly reflect that the amphibious helicopter here come within

the broad, virtually indefinable *Robison* definition of a special purpose craft.[5] The judge found that this amphibious helicopter was specially designed and built not only to take off and land on water but also to taxi on the water. It could move under its self-propulsion on the water to position itself for the loading or unloading of cargo or passengers. He characterized the craft as one designed to function as a crew boat without which the gigantic offshore oil industry's maritime operations, *see Boudreaux v. American Workover, Inc.*, 680 F.2d 1034 (5th Cir., 1982) (en banc), could not function. Indeed this seems to have been the sole function of this helicopter.[6]

More than that the helicopter literally met the Congressional definition that "any artificial contrivance . . . capable of being used, as a means of transportation on water" constitutes a vessel.[7] 684 F.2d at 113, n. 40.

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5. It must be emphasized that a *Robison* vessel determination does not necessarily or automatically mean Jones Act status, so the question is broader than: "Is the injured worker a Jones Act seaman?" *See Dugas v. Pelican Construction Co.*, 481 F.2d 773 (5th Cir. 1973) (not a Jones Act seaman but entitled to seaman's warranty of seaworthiness).

6. The Supreme Court in *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 619, n. 2, 98 S.Ct. 2010, 2011, n. 2, 56 L.Ed.2d 581, 583, n. 2, said "[t]he District Court bottomed admiralty jurisdiction on a finding that the helicopter was the functional equivalent of a crewboat. The ruling has not been challenged in this Court." (citation omitted).

7. Since we are dealing directly with the usage of not only the LHWCA but also more recently the 1953 OCSLA, 43 U.S.C. § 1333 (c)(1) as amended September 18, 1978, 43 U.S.C. § 1333(b)(1), the Court's explanation, 684 F.2d at 1113, n. 40, not only ignores these historical facts (plus the substantial 1972 amendments to the LHWCA) but also this Court's express conclusion that we must determine what Congress meant about a matter on which it could not have thought because of technological non-existence. For example,

Whatever the meaning of the full text of 49 U.S.C. § 1509(a) rather than the Court's paraphrase of it, 684 F.2d at 1113, the fact is that in very recent actions Congress has definitely included seaplanes (including helicopters) within the meaning of the term "vessel". In the major overhaul of the International Regulations for Preventing Collisions at Sea, 33 U.S.C. § 1601 *et seq.* (1977), the Congress in 1977 did several significant things. It repealed the long standing "Rules of the Road." It provided for a proclamation by the President and the promulgation of the International Regulations for Preventing Collisions at Sea (International Rules).[8]

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discussing the technological advances made since Congress enacted COGSA, this Court has stated:

> Our principal task in this case is to determine what Congress would have thought about a subject about which it never thought or could have thought and one about which we have never thought nor any other Court has thought. Technology has created a maritime transportation system unlike any which was in existence in 1936 when Congress enacted COGSA. (note omitted).

Wirth Ltd. v. S/S ACADIA FOREST and LASH Barge, 537 F.2d 1272, 1276 (5th Cir. 1976).

The question remains then, what did Congress mean in 1953 when it enacted § 4(b)(1) of the OCSLA, the statute which cuts off the maritime claim for the death of the pilot. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970).

8. The International Rules, *see* 33 U.S.C. § 1602 number 1 through 38.

Rule 3(a) states that:

> (a) The word 'vessel' includes every description of water craft, including nondisplacement craft and seaplanes, used or capable of being used as a means of transportation on water.

Rule 3(e) states that:

> (e) The word 'seaplane' includes any aircraft designed to manoeuvre on the water.

Rule 31 reflects peculiar concern with seagoing aircraft:

> Where it is impracticable for a seaplane to exhibit lights and shapes of the characteristics or in the positions prescribed in the Rules of this Part *she* shall exhibit lights and shapes as closely similar in characteristics and position as is possible. (emphasis supplied).

33 U.S.C. § 1601(1) leaves no doubt that all kinds of seagoing aircraft are included within the term "vessel". It states:

> 'vessel' means every description of watercraft, including nondisplacement craft and seaplanes, used or capable of being used as a means of transportation on water. . . .

A helicopter comes within the statutory definition of a "nondisplacement craft" and certainly fits the qualification of a craft "used or capable of being used as a means of transportation on water." *Id.* As a statutorily defined "vessel", a helicopter is also subject to the elaborate system set up in 33 U.S.C. § 1608 for civil penalties. There, investigative, enforcement and comprehensive measures are provided, including liability of an operator of a vessel and an *in rem* remedy against the craft.

Whatever Congress had or could have had in mind regarding the term "vessel" in 1920 when it first enacted the Jones Act, it is now clear in 1982 and has been ever since 1977 that Congress has no doubts. Congress means to include any and all kinds of seagoing aircraft within the term "vessel", with the sole qualification that the craft be used *or capable of being used* for transportation on or over international waters, which these clearly were, or other waters over which the United States has jurisdiction.

One final note on the term "vessel". The Court stresses that in *Robison* we were concerned with "special purpose structures" which are designed to float and be towed "across water to the drilling site despite their incapacity for *self-propulsion.*" 684 F.2d at 1113. Wave barriers

permanently affixed to the sea floor, *Nelson*, 639 F.2d 469, the elevated boom of a dragline, *Guidry*, 614 F.2d 447, and a submersible oil storage facility, *Hicks*, 512 F.2d 817, and the "Texas Tower" for radar defense of the nation, *Grimes*, 356 U.S. 252, 78 S.Ct. 687, 2 L.Ed. 2d 737, hardly fit that category.

Nor does fidelity to the principles of *Robison* require that the flexible maritime law's concern for those who go down to sea, *see Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974) (following *Moragne*)—whether in ships or today's version of the ship's equivalent—should be denied effectuation of the admiralty remedy which Kolb and all other helicopter pilots, including Barger, have, because the thing—the helicopter—whose use for substantial maritime purposes gives the controversy the prized characterization of a maritime claim, is not a vessel.[9]

I must therefore dissent.

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9. That ascribing vessel status to a helicopter leaves some legal problems unanswered, *see* 684 F.2d at 1114 (limitation of liability, etc.), is no deterrence to the admiralty's adaptability. Recall, for example, that in the boundless *Sieracki* claims, founded on traditional seamen's work, longshoremen never received maintenance and cure. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946).

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81-2262

(Filed March 9, 1983)

MARY E. BARGER,
Plaintiff-Appelle, Cross Appellant,

v.

PETROLEUM HELICOPTERS, INC.,
Defendant-Appellant, Cross Appellee.

Appeals from the United States District Court for the
Eastern District of Texas

Before BROWN, RUBIN and REAVLEY,
Circuit Judges.

BY THE COURT:—

IT IS ORDERED that appellee's motion for leave to file motion for reconsideration of petition for rehearing and suggestion for rehearing en banc is DENIED.

APPENDIX G

Mary E. BARGER

v.

PETROLEUM HELICOPTERS, INC., and
Bell Helicopters International, Inc.,

Civ. A. No. B-77-180-CA.

UNITED STATES DISTRICT COURT,

E. D. Texas,

Beaumont Division.

May 21, 1981.

Action was brought against decedent's employer, engaged in business of transporting personnel to and from oil drilling rigs, and manufacturer of helicopter, to recover damages under the Jones Act arising from death of helicopter pilot. The District Court, Joe J. Fisher, J., held that where helicopter was physically designed for landings, takeoffs, and movement on water, helicopter was engaged in a maritime endeavor, and pilots were exposed to such hazards of the sea as drowning and storms, helicopter was a vessel for purposes of the Jones Act, and thus pilot, who had more than a mere transitory relationship with employer's fleet of helicopters, and whose duties contributed to the function of the vessel in the most essential way, was a seaman.

Ordered accordingly.

Hubert Oxford, III, Benckenstein, McNicholas, Oxford, Radford, Johnson & Nathan, Beaumont, Tex., for plaintiffs.

Vance E. Ellefson, Lugenbuhl, Larzelere & Ellefson, New Orleans, La., for defendant Petroleum Helicopters, Inc., and intervenor American Home Assur. Co.

J. E. Wlliams, Jr., Fulbright & Jaworski, Houston, Tex., for defendant Bell Helicopters/Textron.

MEMORANDUM OPINION[1]

JOE J. FISHER, District Judge.

Just after sunrise on the morning of April 23, 1976, the helicopter piloted by the Plaintiffs' decedent, Walter Barger, crashed into the Gulf of Mexico some 40 miles off the coast of Louisiana. Barger and all eleven of his passengers were killed. The Plaintiffs[2] brought this suit pursuant to Rule 9(h) of the Federal Rules of Civil Procedure, the Jones Act, 46 U.S.C. § 688, the Death on the High Seas Act, 46 U.S.C. § 761 et seq. (DOHSA), and the general maritime law to recover for Barger's death. The Defendants are Petroleum Helicopters, Inc. (PHI), Barger's employer and the owner of the helicopter, and Bell Helicopters/Textron (Bell), the helicopter's manufacturer. The cause of action against Bell is based on Texas tort law applicable in admiralty through DOHSA, *see, e. g., Fosen v. United Technologies Corp.*, 484 F.Supp. 490, 496 (S.D.N.Y.), *aff'd*, 633 F.2d 203

1. This Memorandum Opinion constitutes the findings of fact and conclusions of law required by Rule 52, Fed. R. Civ. P.

2. The Plaintiffs are Mary Elizabeth Barger, the widow, and Elizabeth Jane and Randy Michael Barger, the children.

(2d Cir. 1980), and is pendent to the federal statutory and admiralty claims against PHI.[3] Trial was to the Court.

PHI is engaged in the business of transporting workers to and from drilling platforms in, among other places, the Gulf of Mexico off the coast of Texas and Louisiana. It maintains offices in Sabine Pass, Texas, and Cameron, Louisiana. Barger was employed by PHI as a pilot of one of its helicopters. On the day in question, Barger was operating a Bell 205A-1 PHI-owned helicopter bearing aircraft registration number N8167J from Cameron to a drilling rig owned by Blue Dolphin Corporation in the Gulf of Mexico. Barger was ferrying eleven Blue Dolphin employees to the rig. Approximately 40 miles offshore and 5 to 6 miles from the Blue Dolphin rig, the tail boom separated from the main body of the helicopter in flight, causing it to spin uncontrollably and crash into the Gulf.[4]

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3. The claims against Bell easily meet the requirements set out in *United Mine Workers v. Gibbs*, 383 U.S. 715, 725-26, 86 S.Ct. 1130, 1138-39, 16 L.Ed.2d 218 (1966), for the exercise of pendent jurisdiction: the federal claim must have sufficient substance to confer subject matter jurisdiction; the state and federal claims must derive from a common nucleus of operative fact; the nature of the plaintiffs' claims is such that they would ordinarily expect to try them all in one proceeding; and the decision to try the claims together must be justified by considerations of judicial economy, convenience, and fairness to the litigants. *See Connecticut General Life Ins. Co. v. Craton*, 405 F.2d 41, 48 (5th Cir. 1968). The exercise of discretion in favor of pendent jurisdiction is particularly appropriate in admiralty cases. *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800, 808-11 (2d Cir. 1971).

4. The evidence shows that the tail boom serves two very important functions: it acts as a counterweight to the main body of the helicopter, allowing the craft to fly on a level plane; and it provides sideways thrust through a tail rotor to overcome the tendency of the cabin to spin in a direction opposite to that of the blades. Therefore, when the tail boom separated from the cabin of Barger's helicopter, the cabin began to tumble forward and, at the same time, to spin at a rapid rate.

The tail boom separated when two of the four longeron fittings that attach the tail to the cabin failed. The evidence establishes that the upper left longeron fitting failed due to corrosion[5] and metal fatigue. The lower left longeron fitting failed immediately afterward, likewise due to corrosion and metal fatigue. Prior to the time of the crash, the two left fittings exhibited fatigue striations, which are marks on a fatigue fracture made by an advancing crack. The fatigue portions of the cracks were over an inch wide and an inch long in the upper left fitting and almost an inch and a half to an inch in the lower left. There were two cracks in each of the left longeron fittings. These cracks had been present for at least several hundred flight hours prior to the crash.

PHI had removed the tail boom from the helicopter in question three years and 3,747 flight hours prior to the crash. On reassembly, one of the bolts used was of an incorrect type and five of other fasteners were installed backwards.[6] Both the Bell instruction manual and PHI's own inspection and maintenance procedures required that the longeron fittings be visually inspected every 100 flight hours. PHI had knowledge that there could be problems with these fittings in a corrosive environment by virtue of its having submitted to Bell nearly three years earlier a Malfunction Defect Report (MDR) along with a failed

5. PHI operates its helicopters in a very corrosive, salt water and sea air environment.

6. The odd bolt was the closest to the fatigue area and of a slotted type, designed for use with a screwdriver. A gouge or nick was caused during installation when the screwdriver slipped from the head of this bolt and banged into the forging. The fatigue area spread, due to stress, from this gouge. Although the installation of incorrect and backward bolts would not have, alone, caused the fittings to fail, it is indicative of PHI's grossly inadequate maintenance program.

upper left fitting.[7] In early 1974, Bell reported to PHI the cause of the failure, and orally advised a PHI employee that its inspection procedures should be modified so as to more closely inspect the longeron fittings, without providing specific instructions on how to do so.

PHI is the largest commercial helicopter firm in the world and clearly has the requisite experience and expertise to properly inspect and maintain its helicopters. In particular, PHI's mechanics are experts in the field of helicopter repair and maintenance, are FAA certified, and should be held to the standard of an expert. *Martinez v. Dixie Carriers, Inc.*, 529 F.2d 457, 464, 465-66 (5th Cir. 1976). As such, PHI could have been reasonably expected to devise a proper method of inspecting the longeron fitting on its helicopters, despite the lack of formal instructions from Bell.[8] In fact, the National Transportation Safety Board inspector assigned to this crash found that, prior to the crash, PHI had in fact established a procedure to inspect these fittings. The failure of PHI's employees to discover the cracks and the gouge in the two left longeron fittings during one of the 100 hour inspections that took place while the cracks were in existence and visible for about 300 flight hours prior to the crash constitutes negligence, which was a contributing cause of the crash and the death of the Plaintiffs' decedent.

The evidence indicates that the tail boom of helicopters operating in a corrosive environment should be complete-

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7. The evidence shows that the cause of the failure of the fitting that was the subject of the earlier MDR was mechanically identical to that of the upper left fitting on Barger's helicopter.

8. Prior to the accident, in addition to the oral warning noted above, Bell's maintenance manual called for a "thorough and searching" inspection of the helicopter, including the longeron fiittings, every 100 hours of flight time.

ly removed and carefully scrutinized at no more than 1,000 flight-hour intervals.[9] Such an inspection would have readily disclosed the fatigue cracks in the left longeron fittings. The failure of PHI to remove the tail boom from Barger's helicopter for a period in excess of 3,700 flight-hours constitutes negligence, which was a contributing cause of the crash made the basis of this suit. PHI's negligence in failing to perform this type of inspection is particularly blameworthy, as it previously had knowledge of the tendency of the longeron fittings to fail in the environment in which its business is conducted.

[1] The quantum of negligence required to impose liability under the Jones Act is very slight, and it need only be a contributing cause of the incident giving rise to the suit. *Allen v. Seacoast Products, Inc.*, 623 F.2d 355, 361 (5th Cir. 1980); *Reyes v. Vantage Steamship Co.*, 609 F.2d 140, 142 (5th Cir. 1980); *Davis v. Hill Engineering, Inc.*, 549 F.2d 314, 329 (5th Cir. 1977); *Bush v. Texaco, Inc.*, 504 F.Supp. 670, 672 (E.D. Tex. 1981). The Plaintiffs easily satisfied this featherweight burden.

[2, 3] The duty to provide a reasonably seaworthy vessel is absolute and is completely independent of the employer's obligation to exercise reasonable care. *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 327, 81 S.Ct. 6, 9, 5 L.Ed.2d 20 (1960); *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 549, 80 S.Ct. 926, 932, 4 L.Ed.2d 941 (1960). If, as the Plaintiffs contend, the helicopter, under the facts of this case, was a vessel within the meaning of the Jones Act and the general maritime

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9. This procedure is relatively simple to perform and takes approximately three hours to complete.

law, then it is abundantly clear that it was not reasonably fit for its intended purpose and, therefore, unseaworthy. *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 499, 91 S.Ct. 514, 517, 27 L.Ed.2d 562 (1971); *Mitchell*, 362 U.S. at 550, 80 S.Ct. at 933. The Court finds that such unseaworthy condition was a proximate cause of the crash.

[4] The helicopter was in normal use at the time of the crash, and was in substantially the same condition as when it was sold to PHI by Bell in 1970. The helicopter was designed so that a part which is subjected to a great amount of stress, the upper left longeron fitting, was located in a position not readily accessible for inspection. The evidence at trial shows that Bell could have designed the 205A-1 to eliminate the joint requiring longeron fittings completely, used fittings made of steel or some other non-critical alloy, placed the fittings on the outside of the craft for easy inspection, or provided an easily removable inspection panel on the skin of the tail boom.

Moreover, the Court finds that the upper left longeron fitting, which is subject to more stress while underway than the other three fittings, was of insufficient strength and design for the use for which it is intended. The benefits, if any, from the use of longeron fittings as described above are heavily outweighed by the risks such design imposes upon the user of the product. *Turner v. General Motors Corp.*, 584 S.W.2d 844, 847 & n. 1 (Tex. 1979). As designed, the Bell 205A-1 helicopter was defective and unreasonably dangerous within the meaning of section 402A of the Restatement (Second) of Torts (1965). *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 789 (Tex. 1967); *Bell Helicopter Co. v. Bradshaw*,

594 S.W.2d 519, 530 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.). Such defective design was a producing cause of the crash of April 23, 1976. *General Motors Corp. v. Hopkins*, 548 S.W.2d 344, 351 & n. 3 (Tex. 1977).

The evidence unequivocally shows that Barger in no way contributed to causing the accident. In addition, there was nothing he could have done after the tail boom separated to prevent the crash. The Court finds that, on the occasion in question, the Plaintiffs' decedent was not negligent.

[5] The comparative fault of the Defendants will be assessed at 80% for PHI and 20% for Bell. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409, 74 S.Ct. 202, 204, 98 L.Ed. 143 (1953); *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246, 1249 (5th Cir. 1979); *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968, 982 (5th Cir. 1978). *Cf. United States v. Reliable Transfer Co.*, 421 U.S. 397, 407, 95 S.Ct. 1708, 1713, 44 L.Ed.2d 251 (1975).

In order for the Plaintiffs to recover under the Jones Act, 46 U.S.C. § 688,[10] they must show that Barger was

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10. The Jones Act provides, in pertinent part, that

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable.

a seaman. *Swanson v. Marra Brothers, Inc.*, 328 U.S. 1, 5, 66 S.Ct. 869, 871, 90 L.Ed. 1045 (1946); *Wixom v. Boland Marine & Manufacturing Co., Inc.*, 614 F.2d 956, 957 (5th Cir. 1980); *Guidry v. South Louisiana Contractors, Inc.*, 614 F.2d 447, 452 (5th Cir. 1980); *Wilkerson v. Movible Offshore, Inc.*, 496 F.Supp. 1279, 1282 (E.D. Tex. 1980). The Fifth Circuit has fomulated a three-part test for determining whether a given employee is a seaman for purposes of the Jones Act:[11]

> (1) he must have a more or less permanent connection with (2) a vessel in navigation and (3) the capacity in which he is employed or the duties which he performs must contribute to the function of the vessel, the accomplishment of its mission or its operation or welfare in terms of its maintenance during its movement or during anchorage for its future trips.

Guidry v. South Louisiana Contractors, Inc., 614 F.2d at 452; *Guidry v. Continental Oil Co.*, 640 F.2d 523, 528 (5th Cir. 1981); *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959).

[6, 7] The question of seaman status is virtually always an issue of fact for the factfinder. *Gianfala v. Texas Co.*, 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 775 (1955), *rev'ing per curiam* 222 F.2d 382 (5th Cir.); *Landry v. Amoco Production Co.*, 595 F.2d 1070, 1071 (5th Cir. 1979). Moreover, "[t]here is nothing in the [Jones Act] to indicate that Congress intended the law to apply only to conventional members of a ship's company." *Robison*,

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11. A seaman for purposes of the Jones Act is also a seaman under the general maritime law and is, therefore, entitled to the warranty of seaworthiness. *Braen v. Pfeifer Oil Transportation Co., Inc.*, 361 U.S. 129, 132, 80 S.Ct. 247, 249, 4 L.Ed.2d 191 (1959); *The Osceola*, 189 U.S. 158, 175, 23 S.Ct. 483, 487, 47 L.Ed. 760 (1903).

266 F.2d at 780. Assuming for the moment that the helicopter in question was a vessel, there is no disputing that Barger had a more or less permanent connection with it. He had worked for PHI as a helicopter pilot from January of 1970 until his death. His was much more than a mere transitory relationship with PHI's fleet of crafts. *Ardoin v. J. Ray McDermott & Co.*, 641 F.2d 277, 281 (5th Cir. 1981); *Davis v. Hill Engineering, Inc.*, 549 F.2d 314, 326 (5th Cir. 1977).

Similarly, there can be no doubt that Barger's duties contributed to the function of the vessel in the most essential way. PHI has admitted as much. He was its pilot, navigator, and sole crewmember. The third part of the test for seaman status has been satisfied. *Higginbotham v. Mobil Oil Corp.*, 545 F.2d 422, 433 n. 13 (5th Cir. 1977), *rev'd on other grounds*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978).

[8] Now we come to the heart of this case: whether the helicopter was a vessel within the meaning of the Jones Act and the general maritime law. We start with the proposition that the Jones Act is remedial legislation, and is to be broadly construed. *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 375, 53 S.Ct. 173, 175, 77 L.Ed. 368 (1932); *Spinks v. Chevron Oil Co.*, 507 F.2d 216, 224 (5th Cir. 1975); *Pure Oil Co. v. Suarez*, 346 F.2d 890, 895 (5th Cir. 1965), *aff'd*, 384 U.S. 202, 86 S.Ct. 1394, 16 L.Ed.2d 474 (1966). As Judge Wisdom wrote in *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959),

> There is no reason for lamentations. Expansion of the terms "seaman" and "vessel" are [*sic*] consistent with the liberal construction of the Act that has

> characterized it from the beginning and is consistent with its purposes.

Id. at 780.

[9] The Bell 205A-1 helicopter involved in this case was equipped with pontoons, a life raft, and other life-saving apparatus. The pontoons were permanently affixed by Bell prior to sale to PHI and enabled the craft to land, take-off, float, and taxi on water. The helicopter lands on these rubberized floats each time it sets down, whether on land, on a drilling rig, or on water. There is no limitation on the distance a pontoon-fitted helicopter can taxi, but Bell recommends that this type helicopter not be operated where wave heights exceed 36 inches from trough to crest. Barger underwent extensive training on how to land, taxi, and take-off from water prior to being allowed to operate one of PHI's crafts.

The Merchant Marine Act of 1920,[12] of which the Jones Act is a part,[13] incorporates the definition of "vessel" contained in the Shipping Act of 1916,[14] as amended. This latter act provides as follows:

> The term "vessel" includes all water craft and other artificial contrivances of whatever description and at whatever stage of construction, whether on the stocks or launched, which are used or are capable of being or are intended to be used as a means of transportation on water.

Act of September 7, 1916, ch. 451, § 1, 39 Stat. 728, as amended by the Act of July 15, 1918, ch. 152, § 1,

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12. Act of June 5, 1920, ch. 250, §§ 1-39, 41 Stat. 988-1008.

13. Act of June 5, 1920, ch. 250, § 33, 41 Stat. 1007.

14. Act of September 7, 1916, ch. 451, §§ 1-36, 39 Stat. 728-38.

40 Stat. 900, now codified as 46 U.S.C. § 801. *See also* 1 U.S.C. § 3.[15] This definition encompasses "special purpose structures not usually employed as a means of transport by water but designed to float on water." *Robison*, 266 F.2d at 779. A helicopter equipped with permanently affixed pontoons is certainly an artificial contrivance capable of being used as a means of transportation and to float on water. However, the inquiry does not end there.

There is no hard and fast definition of vessel. As Judge Wisdom so aptly put it,

> Attempts to fix unvarying meanings, have [*sic*] a firm legal significance to such terms as "seaman", "vessel", "member of a crew" must come to grief on the facts. These terms have such a wide range of meaning under the Jones Act as interpreted in the courts, that, except in rare cases, only a jury or trier of facts can determine their application in the circumstances of a particular case.

Id. at 779-80. Recent cases in the Fifth Circuit establish the rule that "[i]n determining what is a vessel, we consider the purpose for which the craft is constructed and the business in which it is engaged." *Blanchard v. Engine & Gas Compressor Services, Inc.*, 575 F.2d 1140, 1142 (5th Cir. 1978) [citing *The Robert W. Parsons*, 191 U.S. 17, 24 S.Ct. 8, 48 L.Ed. 73 (1903)[16]]; *Guidry v.*

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15. This statute similarly defines "vessel" as follows: "The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3.

16. The *Parsons* Court wrote that "neither size, form, equipment nor means of propulsion are determinative factors upon the question of jurisdiction, which regards only the purpose for which the craft was constructed, and the business in which it is engaged." 191 U.S. at 30, 24 S.Ct. at 12.

Continental Oil Co., 640 F.2d at 529 n. 18; *Smith v. Massman Construction Co.*, 607 F.2d 87, 88 (5th Cir. 1979); *Hicks v. Ocean Drilling & Exploration Co.*, 512 F.2d 817, 823 (5th Cir. 1975), *cert. denied sub nom. H. B. Buster Hughes, Inc. v. Ocean Drilling & Exploration Co.*, 423 U.S. 1050, 96 S.Ct. 777, 46 L.Ed.2d 639 (1976); *Cook v. Belden Concrete Products, Inc.*, 472 F.2d 999, 1001 (5th Cir.), *cert. denied*, 414 U.S. 868, 94 S.Ct. 175, 38 L.Ed.2d 116 (1973).

Barger's helicopter was constructed for the purpose of transporting men and material across the navigable waters of the Gulf of Mexico. The craft was specifically designed for landings, take-offs, and movement on water. Thus, the first prong of the analysis has been met.

As noted above, PHI is the largest commercial helicopter firm in the world. They are engaged almost exclusively in the business of transporting personnel to and from oil drilling platforms located in the territorial and navigable waters of the United States and other countries. There is no doubt that this is a traditional maritime activity and that Barger's helicopter was the functional equivalent of a crewboat.[17] *See Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 619 n. 2, 98 S.Ct. 2010, 2012 n. 2, 56 L.Ed.2d 581 (1978). The craft in question was engaged in a maritime endeavor sufficient to satisfy the second prong of our analysis.

Flotation on water does not alone qualify a given structure as a "vessel" for Jones Act purposes. The addi-

17. PHI admitted in its post-trial memorandum that "the helicopter in question was performing a maritime activity traditionally performed by waterborne vessels, i.e. transporting personnel engaged in the exploration for petroleum and minerals on the Outer Continental Shelf, between platforms and vessels, over navigable waters."

tional element of risk and exposure to the hazards of the sea must be present. *Hicks,* 512 F.2d at 823; *Atkins v. Greenville Shipbuilding Corp.,* 411 F.2d 279, 283 (5th Cir.), *cert. denied,* 396 U.S. 846, 90 S.Ct. 105, 24 L.Ed. 2d 96 (1969). Barger and PHI's other pilots are certainly exposed to such hazards of the sea as drowning and storms, perhaps even to a greater degree than blue-water sailors.[18] *See Robison,* 266 F.2d at 780. When a PHI helicopter malfunctions in the way it did in this case, the pilot and passengers stand a far greater chance of losing their lives in the mishap than their counterparts aboard a traditional seagoing vessel.

In sum, the Court finds that, in the circumstances of this case, that the Bell 205A-1 helicopter piloted by Walter Barger was a vessel within the meaning of the Jones Act and the general maritime law of the United States, and that Barger was a seaman.

[10] PHI vigorously maintained throughout the trial that Barger was not a seaman but a longshoreman and, therefore, subject to the provisions of the Longshoremen and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. (LHWCA). Yet, section 905(b) of the LHWCA gives an injured longshoreman the right to bring an action against the vessel owner for negligence.[19] The circumstance that the vessel owner and the employer are the

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18. Barger's body was lost at sea and never recovered.

19. The relevant portion of the statute provides that:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title.

33 U.S.C. § 905(b).

same entity does not preclude such an action. *Smith v. M/V Captain Fred,* 546 F.2d 119, 123 (5th Cir. 1977).[20] While adhering to the finding that the helicopter in this case was a vessel, the Court finds, in the alternative, that should Barger be a longshoreman, the Plaintiffs have proved ample negligence and causation to support recovery against PHI under section 905(b) of the LHWCA.

The Court allowed PHI to amend its answer some two years after this action was commenced in order to assert its right to limit its liability to the value of the vessel and pending freight at the end of the voyage, pursuant to the Limitation of Liability Act, 46 U.S.C. § 181 et seq. (Limitation Act). Although the procedures outlined in section 185 of the Limitation Act were not followed, the law is settled that limitation of liability may be pled by way of answer, in which case the requirements of section 185 do not apply.[21] *Murray v. New York Central R.R. Co.,* 287 F.2d 152, 153 (2d Cir.), *cert. denied,* 366 U.S. 945,

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20. The House Report accompanying the 1972 amendments to the LHWCA supports this proposition:

> The Committee has also recognized the need for special provisions to deal with a case where a longshoreman or ship builder or repairman is employed directly by the vessel. In such case, notwithstanding the fact that the vessel is the employer, the Supreme Court, in *Reed v. S. S. Yaka,* 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed.2d 448 (1963) and *Jackson v. Lykes Bros. Steamship Co.,* 386 U.S. 731, 87 S.Ct. 1419, 18 L.Ed.2d 488 (1967), held that the unseaworthiness remedy is available to the injured employee. The Committee believes that the rights of an injured longshoreman or ship builder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor.

H.R. Rep. No. 1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Admin. News, pp. 4698, 4705 (footnotes omitted).

21. Section 185 requires that the petition to limit liability be filed within 6 months of notice of a claim, and the vessel owner must deposit the value of the vessel into the registry of the court or with a trustee appointed by the court.

81 S.Ct. 1674, 6 L.Ed.2d 856 (1961); *Deep Sea Tankers, Ltd. v. The Long Branch*, 258 F.2d 757, 772 (2d Cir. 1958), *cert. denied*, 358 U.S. 933, 79 S.Ct. 316, 3 L.Ed.2d 305 (1959); *The Chickie*, 141 F.2d 80, 84 (3d Cir. 1944); *Signal Oil & Gas Co. v. The Barge W-701*, 468 F.Supp. 802, 813 (E.D. La. 1979). *But see Odegard v. Quist*, 199 F.Supp. 449, 451-52 (E.D.N.Y. 1961).

[11, 12] Yet, the Limitation Act will not operate in this case to PHI's benefit. Section 183 provides, in pertinent part, that:

> The liability of the owner of any vessel . . . for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, *without the privity or knowledge of such owner or owners*, shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

46 U.S.C. § 183(a) (emphasis supplied). For its own fault and neglect, the vessel owner remains subject to full liability. *Wyandotte Transportation Co. v. United States*, 389 U.S. 191, 205, 88 S.Ct. 379, 387, 19 L.Ed.2d 407 (1967); *American Car & Foundry Co. v. Brassert*, 289 U.S. 261, 264, 53 S.Ct. 618, 619, 77 L.Ed. 1162 (1933). Moreover, the vessel owner has the burden of proving the absence of privity and knowledge. *Coryell v. Phipps*, 317 U.S. 406, 409, 63 S.Ct. 291, 292, 87 L.Ed. 363 (1943).[22]

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22. "It seems reasonable that the shipowner who invokes the Limitation Act, should bear the burden of proving the absence of privity and knowledge: as to that branch of the case he is the moving party and the facts are peculiarly within his knowledge." G. Gilmore & C. Black, *The Law of Admiralty*, § 10-25 at 895-96 (2d ed. 1975). The burden is initially on the injured party, however, to prove negligence or unseaworthiness. *In re Brasea, Inc.*, 583 F.2d 736, 738 (5th Cir. 1978).

The terms "privity" and "knowledge" are nowhere defined in the Limitation Act. The Supreme Court has written that "[p]rivity, like knowledge, turns on the facts of particular cases."[23] *Coryell*, 317 U.S. at 411, 63 S.Ct. at 293; *Gibboney v. Wright*, 517 F.2d 1054, 1057 (5th Cir. 1975). The abundance of fault shown on the part of supervisory personnel of the corporate vessel owner brings this case within the exception to the Limitation Act. One of PHI's three vice presidents, a Mr. Tysdale, admitted from the witness stand that he knew of the previous upper left longeron failure that occurred in 1973 and of the tendency of this part to fail in a salt water environment. He testified that, despite this knowledge, PHI did not make any changes in its monthly inspection procedures to more closely scrutinize this crucial area. He testified that PHI relied on Bell for its maintenance and inspection procedures and up-dates.

> Privity and knowledge are deemed to exist where the owner had the means of knowledge or, as otherwise stated, where knowledge would have been obtained from reasonable inspection. Knowledge or privity of supervisory shore personnel is sufficient to charge a corporation.

China Union Lines, Ltd. v. A. O. Andersen & Co., 364 F.2d 769, 787 (5th Cir. 1966), *cert. denied*, 386 U.S. 933, 87 S.Ct. 955, 17 L.Ed.2d 805 (1967). The Court finds that PHI failed to carry its burden of proof by a preponderance of the evidence. The facts of this case

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23. Professors Gilmore's and Black's formulation is more colorful: those terms "are empty containers into which the courts are free to pour whatever content they will." G. Gilmore & C. Black, *The Law of Admiralty*, § 10-20 at 877 (2d ed. 1975).

show neglect on the part of PHI more than sufficient to satisfy the definition of privity and knowledge.

[13] The Court has previously found that the vessel was in an unseaworthy condition. The Court now finds that PHI did not discharge its burden of showing the exercise of due diligence to ascertain the craft's seaworthiness. This, alone, is sufficient ground for denying PHI's petition to limit its liability under the Limitation Act. *The Malcolm Baxter, Jr.*, 277 U.S. 323, 331, 48 S.Ct. 516, 517, 72 L.Ed. 901 (1928); *Tug Ocean Prince, Inc. v. United States*, 584 F.2d 1151, 1155 (2d Cir. 1978), *cert. denied*, 440 U.S. 959, 99 S.Ct. 1499, 59 L.Ed.2d 772 (1979); *Federazione Italiana Dei Corsorzi Agrari v. Mandask Compania de Vapores, S.A.*, 388 F.2d 434, 439 (2d Cir.), *cert. denied*, 393 U.S. 828, 89 S.Ct. 92, 21 L.Ed.2d 99 (1968). PHI is not entitled to limit its liability.[24]

[14] Walter Barger was 47 years old at the time of his death and had a work-life expectancy of 17.068 years and a life expectancy of 26.69 years. At the time of his death he was earning $15,230.00 per year base pay from PHI. The evidence shows that he was a very competent pilot and that he would have been promoted pursuant to

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24. It may well be that the helicopter, although a vessel for Jones Act purposes, is not a vessel for purposes of limitation of liability. This is so because, while the Jones Act is to be broadly interpreted, *see, e.g., Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 375, 53 S.Ct. 173, 175, 77 L.Ed. 368 (1932), the Limitation Act is construed narrowly. *Maryland Casualty Co. c. Cushing*, 347 U.S. 409, 437, 74 S.Ct. 608, 622, 98 L.Ed. 806 (1954) (Black, J., dissenting); *Rowe v. United States Fidelity & Guaranty Co.*, 375 F.2d 215, 219 (4th Cir. 1967); *In re Chinese Maritime Trust, Ltd.*, 361 F.Supp. 1175, 1178 (S.D. N.Y. 1972), *aff'd*, 478 F.2d 1357 (2d Cir. 1973), *cert. denied sub nom. Chinese Maritime Trust, Ltd. v. Panama Canal Co.*, 414 U.S. 1143, 94 S.Ct. 894, 39 L.Ed.2d 98 (1974).

the PHI seniority system ahead of those pilots with less seniority than he. His lost earnings from the time of his death to trial, allowing for personal consumption and income tax, were established to be $62,810.00.

[15] The salaries of Barger's contemporaries at PHI grew prior to trial at the rate of 17.65%.[25] The appropriate discount rate is 6.97%. Applying these two rates to Barger's yearly salary and allowing for income tax,[26] 20% personal consumption, and 12% business-related expenses, the Court finds the lost earnings in the future to be $575,468.00.

[16] The evidence adduced at the trial indicates that Walter Barger was extremely helpful around the house. He performed such services for his family as repairing automobiles, air conditioners, refrigerators, lights, bathrooms, and the like. The Court finds that the loss of household services over Barger's life expectancy, discounted at 6.97, amounts to $22,090.00.

[17, 18] Neither DOHSA nor the Jones Act allow recovery of damages for loss of society where a seaman's death occurs on the high seas. *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 622, 98 S.Ct. 2010, 2013, 56 L.Ed.2d 581 (1978) (DOHSA); *Ivy v. Security Barge*

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25. Any increase in growth due to inflation was excluded from this figure by the Plaintiffs' economists. *See Higginbotham v. Mobil Oil Corp.,* 545 F.2d 422, 434-35 (5th Cir. 1977), *rev'd on other grounds,* 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978); *Johnson v. Penrod Drilling Co.,* 510 F.2d 234, 241 (5th Cir. *cert. denied,* 423 U.S. 839, 96 S.Ct. 68, 46 L.Ed.2d 58 (1975).

26. The Court will recognize the current income tax tables found in 26 U.S.C. § 1 as a fair estimate of the taxes that would have been paid by the Plaintiffs' decedent in the future. *Norfolk & Western Ry. Co. v. Liepelt,* 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980).

Lines, Inc., 606 F.2d 524, 529 (5th Cir. 1979) (en banc), *cert. denied*, 446 U.S 956, 101 S.Ct. 27, 65 L.Ed.2d 1173 (1980) (Jones Act).[27] The Court concludes that the Plaintiffs should not recover any damages for loss of society.[28] The two children, Elizabeth Jane and Randy Michael Barger, are, nevertheless, entitled to recover for "the loss of that care, counsel, training and education which [they] might, under the evidence, have reasonably received from [Walter Barger], and which can only be supplied by the service of another for compensation." *Michigan Central R.R. Co. v. Vreeland*, 227 U.S. 59, 71, 33 S.Ct. 192, 196, 57 L.Ed. 417 (1913). This item is recoverable both under the Jones Act, *id.; Higginbotham v. Mobil Oil Corp.*, 360 F. Supp. 1140, 1149 (W.D. La. 1973), *aff'd in part, rev'd in part*, 545 F.2d 422 (5th Cir. 1977), *rev'd on other grounds*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978), and under DOHSA. *Solomon v. Warren*, 540 F.2d 777, 789 (5th Cir. 1976), *cert. dism'd sub nom. Warren v. Serody*, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977).

The evidence shows that Walter Barger was a loving husband and father who assisted and advised his children in their studies and their lives. The Court, therefore, finds that Elizabeth Jane Barger, who was 18 years old but living at home at the time of her father's death, should be awarded $10,000.00 for the loss of her father's nurture,

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27. Quite incongruously, loss of society damages are recoverable where the injury or death is caused by unseaworthiness in territorial waters. *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 100 S.Ct. 1673, 64 L.Ed.2d 284 (1980); *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974).

28. Loss of society damages encompass love, affection, care, attention, companionship, comfort, and protection. *Gaudet*, 414 U.S. at 585, 94 S.Ct. at 814.

counsel, and guidance. The Court further finds that Randy Michael Barger, who was 15 at the time of his father's death should also be awarded $10,000.00 for his loss of nurture, counsel, and guidance.

The Plaintiffs seek an award for the loss of various "fringe benefits" that Barger would have received from PHI in addition to his salary had he not been killed. No evidence was presented at the trial from which the Court can ascertain a specific amount for the loss of fringe benefits. Due to his lack of evidence, the Court will decline to award any sum for this element.

Another item of damages sought is the loss of Barger's naval retirement pay.[29] It appears that Barger made an election to receive a greater amount of monthly pay, which would cease upon his death, rather than to receive a reduced amount and provide for his wife by way of an annuity after his death, pursuant to 10 U.S.C. § 1431. If Barger had intended that his family would receive the benefit of his naval retirement, he would have made such an election under the statute. The Court will make no award for this item of damages.

The final element of damages sought by the Plaintiffs is an award for Barger's conscious pain and suffering during the interval between the time the helicopter began to spin and tumble uncontrollably until it hit the water. According to a Mr. Messer, ten to fifteen minutes after sunrise on the day of the crash, he heard a Mayday and someone crying for help over his radio. The testimony shows that PHI's pilots normally operated their crafts at 500-800 feet above the surface of the water. At that

29. Walter Barger was a retired submariner, a seaman by profession.

height, it would have taken Barger's helicopter approximately ten seconds to hit the water. Moreover, due to the violent spinning and tumbling, it is doubtful that Barger or his passengers would have been alive all the way to the water.

[19-21] There can be no award for conscious pain and suffering where the decedent was in all probability rendered immediately unconscious as a result of his injuries. *Mpiliris v. Hellenic Lines, Ltd.*, 323 F. Supp. 865, 894 (S.D. Tex. 1970), *aff'd*, 440 F.2d 1163 (5th Cir. 1971). Where the immediacy of the injuries and the absence of specific evidence renders too speculative a finding that the decedent consciously suffered pain, any award for this element would be improper. *In re Dearborn Marine Service, Inc.*, 499 F.2d 263, 288 (5th Cir. 1974), *cert. denied*, 423 U.S. 886, 96 S.Ct. 163, 46 L.Ed.2d 118 (1975). The evidence of the violent gyrations of his craft indicates that it was more likely than not that Barger was rendered unconscious immediately. Therefore, the claim for conscious pain and suffering will be denied.

[22] American Home Assurance Company, PHI's workers' compensation carrier, has paid the sum of $26,403.72 to Mrs. Barger as death benefits under the LHWCA. PHI is entitled to credit this sum against its portion of the judgment.

[23-25] In admiralty cases, an award of prejudgment interest is the rule rather than the exception. *Noritake Co., Inc. v. M/V Hellenic Champion*, 627 F.2d 724, 728 (5th Cir. 1980); *McCormack v. Noble Drilling Corp.*, 608 F.2d 169, 175 (5th Cir. 1979). Although not proper in a pure Jones Act case, this rule applies where suit is also brought, as here, in admiralty. *Doucet*

v. Wheless Drilling Co., 467 F.2d 336, 340 (5th Cir. 1972). Where such an award is denied, the trial court must detail the factual basis for the denial. *Mecom v. Levingston Shipbuilding Co.*, 622 F.2d 1209, 1217 (5th Cir. 1980); *Dow Chemical Co. v. M/V Gulf Seas*, 593 F.2d 613, 614 (5th Cir. 1979). The Court can find no ground for denial of prejudgment interest in this case and will direct that the award will bear interest from the date of the crash to the date of entry of the judgment. *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968, 988 (5th Cir. 1978); *In re M/V Vulcan*, 553 F.2d 489, 490-91 (5th Cir.), *cert. denied*, 434 U.S. 855, 98 S.Ct. 175, 54 L.Ed.2d 127 (1977).

[26] Although it would appear that the Court has the discretion to award prejudgment interest at a rate in excess of the statutory rate, *id.* at 491, it will decline the Plaintiffs' invitation to do so. The award will bear interest at the analogous Texas statutory rate, *Geotechnical Corp. v. Pure Oil Co.*, 214 F.2d 476, 478 (5th Cir. 1954), of 6% per annum[30] from the date of the injury, April 23, 1976, to the date of entry of the judgment. Naturally, the judgment will bear interest at the rate of 9% per annum[31] until paid. 28 U.S.C. § 1961.

The amount of the total judgment in favor of Mary Elizabeth Barger, individually and as personal representative of the estate of the decedent, will be $660,368.00 plus prejudgment interest. Bell is liable for 20% of this sum, or $132,073.60. PHI is liable for the remaining 80%, after crediting the amount of the aforementioned

30. Tex. Rev. Civ. Stat. Ann. art. 5069—1.03 (Vernon Supp. 1980).

31. *Id.*, art. 5069—1.05.

LHWCA benefits, or $501,890.68. Randy Michael Barger and Elizabeth Jane Barger are each entitled to $8,000.00 from PHI and $2,000.00 from Bell, plus prejudgment interest.

[27, 28] Neither PHI nor Bell are entitled to contribution or indemnity from the other. *Culver v. Slater Boat Co.*, 644 F.2d 460, 466 (5th Cir., 1981); *Wedlock v. Gulf Mississippi Marine Corp.*, 554 F.2d 240, 243 (5th Cir. 1977). In accordance with the rules set out in *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246, 1248 (5th Cir. 1979), the settlement achieved by Bell relieves it of any further liability to the Plaintiffs and PHI is liable for the entire judgment after crediting the dollar amount represented by the percentage of fault attributed to Bell. Rather than award a defendant for its refusal to settle, no credit will be allowed to PHI for the difference between the amount of Bell's settlement and the amount represented by Bell's percentage of fault.[32] *Id.* at 1251. Costs wil be assessed against PHI.

The Court recognizes that today's finding that the helicopter was a vessel is a departure from the traditional concept of a vessel. The result it reaches today is no more strange than the Fifth Circuit cases holding that movible offshore drilling platforms are vessels for Jones Act purposes, while fixed platforms are not. *See, e.g., Longmire v. Sea Drilling Corp.*, 610 F.2d 1342, 1348 (5th Cir. 1980).

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32. Bell settled its portion of the case with the Plaintiffs immediately prior to trial for $225,000.00. Bell's part of the judgment would otherwise have been $134,073.60.

> The absence of any legislative restriction has enabled the law to develop naturally along with the development of unconventional vessels, such as the strange-looking specialized watercraft designed for oil operations offshore and in the shallow coastal waters of the Gulf of Mexico.

Robison, 266 F.2d at 780. Workers on movible platforms are seamen even though the rigs are jacked-out of the water and not at all vessel-like when an injury occurs. *Id.* at 772. There is, indeed, no reason for lamentations. Expansion of the law is required to adapt to changes in our environment and in the way we live our lives, and is consistent with the humanitarian purposes of the Jones Act and other laws protecting those who encounter the hazards of the sea.

It is so ordered.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. B-77-180-CA

MARY E. BARGER

V.

PETROLEUM HELICOPTERS, INC.,
and BELL HELICOPTERS
INTERNATIONAL, INC.

FINAL JUDGMENT

IN ACCORDANCE with the Memorandum Opinion entered this day, it is hereby Ordered that the plaintiff Mary Barger do have and recover from Petroleum Helicopters, Inc., the sum of FIVE HUNDRED ONE THOUSAND, EIGHT HUNDRED NINETY DOLLARS AND 68/100 ($501,890.68) plus prejudgment interest at the rate of SIX PERCENT (6%), and it is further

ORDERED that plaintiff Elizabeth Barger do have and recover from Petroleum Helicopters, Inc., the sum of EIGHT THOUSAND and NO/100 DOLLARS ($8,000.00) plus prejudgment interest, and plaintiff Randy Michael Barger have and recover from Petroleum Heli-

copters the sum of EIGHT THOUSAND and NO/100 DOLLARS ($8,000.00) plus prejudgment interest, and it is further

ORDERED that Mary Barger do have and recover from Bell Helicopters International, Inc., the sum of ONE HUNDRED THIRTY TWO THOUSAND, TWO HUNDRED SEVEN AND 60/100 DOLLARS ($132,207.60) plus prejudgment interest, and plaintiff Elizabeth Barger recover from Bell Helicopters the sum of TWO THOUSAND and NO/100 DOLLARS ($2,000.00) plus prejudgment interest, and plaintiff Randy Michael Barger do have and recover from Bell Helicopters the sum of TWO THOUSAND AND NO/100 DOLLARS ($2,000.00) plus prejudgment interest, and it is further

ORDERED that Petroleum Helicopters, Inc., pay the costs of this action.

SIGNED and ENTERED this the 20th day of May, 1981.

/s/ JOE J. FISHER
Joe J. Fisher
United States District Judge